# United States Court of Appeals For the Ninth Circuit

MARGURITE L. CONNELL,

Plaintiff-Appellee,

VS.

Edgar Robert Errion, also known as E. R. Errion and Bob Errion, Amy Errion, Violet Kellerstraus, and C. W. Williamson, Defendants-Appellants,

DWIGHT HOLDORF, OPAL HOLDORF, HOLDORF OYSTER CORPORATION, a Washington Corporation, INAR GLASER, DOROTHY GLASER, KATHERINE GOLD, H. A. DAVENPORT, also known as LEE DAVENPORT, CORA SCOTT, et al.,

Defendants.

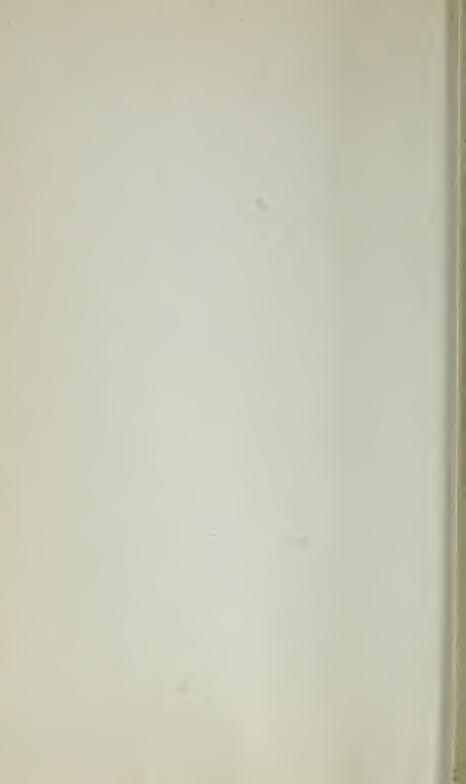
APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

#### **BRIEF OF APPELLANTS**

OLWELL AND BOYLE
LEE OLWELL
THOMAS C. BOYLE
Attorneys for Appellants

306 Joseph Vance Building, Seattle 1, Washington.

FILED



# United States Court of Appeals For the Ninth Circuit

Margurite L. Connell,

Plaintiff-Appellee,

VS.

Edgar Robert Errion, also known as E. R. Errion and Bob Errion, Amy Errion, Violet Kellerstraus, and C. W. Williamson, Defendants-Appellants,

DWIGHT HOLDORF, OPAL HOLDORF, HOLDORF OYSTER CORPORATION, a Washington Corporation, INAR GLASER, DOROTHY GLASER, KATHERINE GOLD, H. A. DAVENPORT, also known as LEE DAVENPORT, CORA SCOTT, et al.,

Defendants.

Appeal from the United States District Court Western District of Washington Northern Division

#### **BRIEF OF APPELLANTS**

OLWELL AND BOYLE

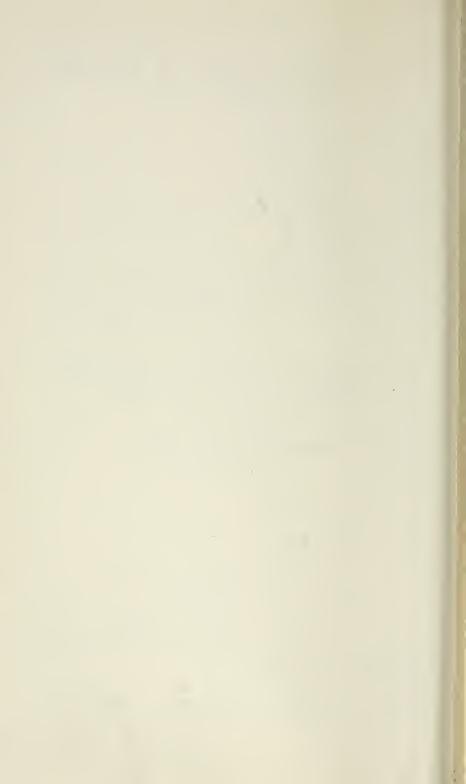
LEE OLWELL

THOMAS C. BOYLE

Attorneys for Appellants

Southly 1. Workington

Seattle 1, Washington.



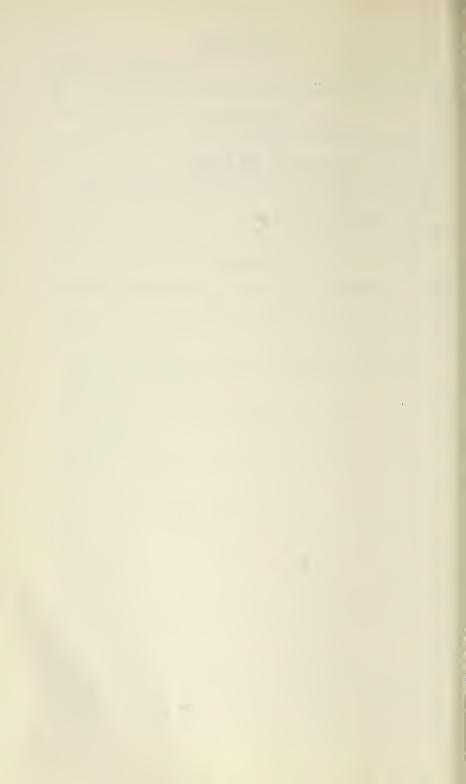
# **INDEX**

	Page
I	Jurisdiction1
II.	Statement of the Case
	Ruling of District Court 8
	Questions Involved
II.	Specification of Errors
	. Summary of Argument 15
	Argument 18
	1. The District Court Lacked Jurisdiction over
	Appellants and each of them and over Plain-
	tiff's alleged cause of action against appellants
	for the reason that plaintiff did not establish that
	any act or transaction constituting a violation of the Securities Exchange Act of 1934 or any
	rule of the Commission promulgated thereunder
	occurred within the jurisdiction of the United
	States District Court for the Western District
	of Washington
	2. The relief sought by plaintiff is predicated upon
	the alleged damage occurring to her by reason of the transfer of her properties which transfer
	occurred in August, September and October of
	1949. Nothing which took place following Octo-
	ber of 1949 gave rise to any cause of action, and
	plaintiff's cause of action, if any, was complete
	certainly by October 29th, 1949. It is barred, therefore, by the Statute of Limitations 21
	therefore, by the Statute of Limitations 21
	3. The judgment of February 17th, 1955, as to each of appellants is not and the respective findings
	of fact as to each of the appellants are not sup-
	ported by the evidence
	(A) Evidence as to Amy Errion 28
	(B) C. W. Williamson 28
	(C) Violet Kellerstraus 29
	(D) E. R. Errion
	4. It was a grievous and material abuse of discre-
	tion for the District Court to deny to appellants
	and particularly to appellant, E. R. Errion, the
	motion for vacation of the trial setting and for a continuance
	UVALVALIUULIUU

5. No proper service was had upon defendant V	io-
let Kellerstraus and the court therefore lack	
jurisdiction over her person	34
VI. Conclusion	35
Appendix—Statutes and Rule Involved	37
TABLE OF CASES	
Cerckonek v. Dibble, 42 Wn.(2d) 451, 256 P.(2d) 488	26
Counzelman v. N.W.P. & D. Prod. Co., 190 Or. 332, 225 P.(2d) 642	27
Dobbin v. Pacific Coast Coal Co., 25 Wn.(2d) 190, 170 P.(2d) 642	27
Elliott v. Lawson, 87 Or. 450, 170 Pac. 925	33
Fratt v. Robinson, 203 F.(2d) 627 (C.A.9, 1953)	19
Harran, et al. v. Morgenthau, 89 F.(2d) 863 (App. D.C. 1937)	32
Joseph v. Farnsworth Radio & Television Corp., 99 F.Supp. 701 (D.C., S.D., N.Y., 1951); 198 F.(2d) 883 (2 C.C.A. 1952)	20
Karkorian v. Fermanian, 189 N.Y.S. 130	33
McCutcheon's Adm'r. v. Dean, 246 Ky. 257, 54 S.W. (2d) 926	33
Melton v. United Retail Merchants, 24 Wn. (2d) 145, 163 P. (2d) 619	25
Metropolitan Casualty Insurance Co. v. Lesher, 152 Or. 161, 52 P.(2d) 1133	26
Miller et ux. v. Protrka, et ux., 193 Or. 585, 238 P. (2d) 753	26
Musgrove et ux., v. Lucas et ux., 193 Or. 401, 238 P. (2d) 780	27
Paddock v. Todd, 37 Wn. (2d) 711, 225 P. (2d) 876	31
Sackman's Estate, In re, 34 Wn.(2d) 864, 210 P. (2d) 682	
State v. Harras, 22 Wash. 57, 60 Pac. 58	22
Townsend's Estate, In re, 122 Ia. 246, 97 N.W. 1108	33 33
Webster v. Romano Engineering Corp., 178 Wash. 118, 34 P.(2d) 428	
Wimer v. Smith, 22 Ore. 469, 30 Pac. 416.	<ul><li>27</li><li>26</li></ul>
010. 100, 00 1 ac. 410	20

# **TEXTBOOKS**

Page		
44 Ill. L. Rev. 841 (1950)		
STATUTES		
Oregon Rev. Statutes 12.110		
Rem. Rev. Statutes Sect. 159 (4) 22		
Securities Exchange Act of 1934, Sect. 10(b), Sect.		
27, Sect. 29(b), 15 U.S.C. Sect. 78j(b), Sect.		
78AA and Sect. 78CC(b)		
28 U.S.C. Sect. 1291 and 1294		
D		
RULES		
Rule X-10b-5, 17 C.F.R., Sect. 284, 10b-51, 10, 18, 20, 37		



# United States Court of Appeals For the Ninth Circuit

MARGURITE L. CONNELL,

Plaintiff-Appellee,

VS.

Edgar Robert Errion, also known as E. R. Errion and Bob Errion, Amy Errion, Violet Kellerstraus, and C. W. Williamson, Defendants-Appellants,

No. 14797

WILLIAMSON, Defendants-Appellants,
DWIGHT HOLDORF, OPAL HOLDORF, HOLDORF OYSTER CORPORATION, a WashingCorporation, INAR GLASER, DOROTHY
GLASER, KATHERINE GOLD, H. A. DAVENPORT, also known as LEE DAVENPORT,
CORA SCOTT, et al, Defendants.

Appeal from the United States District Court Western District of Washington Northern Division

#### **BRIEF OF APPELLANTS**

Ī.

### **JURISDICTION**

Jurisdiction of the District Court was sought to be obtained upon and under Section 10(b), Section 27 and Section 29(b) of the Securities Exchange Act of 1934. 15 U.S.C., Sect. 78J(b), Sect. 78AA and Sect. 78CC(b), together with Rule X-10b-5 as promulgated by the Securities Exchange Commission, 17 C.F.R., Sect. 248, 10b-5.

Those statutory provisions and the above rule are set forth in the appendix.

Allegations in the pleadings alleging such jurisdiction are found in paragraphs I and IX of plaintiff's complaint (R. 2,4, Vol. II). These allegations are denied in appellants' answer (R. 46, 47, Vol. II).

Jurisdiction of this court is based upon 28 U.S.C., Sect. 1291 and 1294. Final judgment was entered January 17th, 1955 (R. 140A, Vol. II). Timely motion for judgment notwithstanding judgment and in the alternative for a new trial was filed January 26th, 1955 (R. 141, Vol. II). Order denying defendants' motion for judgment notwithstanding judgment and in the alternative for a new trial was entered February 9th, 1955 (R. 142, Vol. II). Notice of appeal and bond for costs on appeal were filed with the District Court March 9th, 1955 (R. 144, 145, 146, Vol. II).

#### II.

### STATEMENT OF THE CASE

This is an action for damages, together with rescission of certain instruments, predicated upon matters which were alleged to have been contrary to the Securities Exchange Act of 1934 and the Rules of the Securities and Exchange Commission promulgated thereunder.

Plaintiff was and is now a resident of Seattle, Washington (R. 2, Vol. II) and defendants, E. R. Errion, Amy Errion, C. W. Williamson, and Violet Kellerstraus, appellants herein, were and at all times mentioned are now residents of the State of Oregon (R. 2, 47, Vol. II).

The complaint is extremely voluminous and it would

be a burden upon the court to quote at length therefrom. It appears in Volume II of the record and takes up the first thirty four pages thereof. Suffice it to say for the present that the complaint alleges that prior to October 19th, 1949, plaintiff was the owner of certain properties (all of which she denominates as securities) having a total approximate value of \$118,000.00 (R. 6, Vol. II); that defendants made certain false representations; and that relying upon such representations on or about October 19th, 1949, plaintiff transferred all of her "securities" to defendants for and in consideration of receiving from defendants 125 acres of tideland situated in Coos Bay, Oregon, of a value of less than \$12,500.00 (R. 15, Vol. II).

The prayer of plaintiff's complaint asks for rescission and cancellation of certain instruments and for a money judgment for fraud and deceit against the defendants in the total amount of \$73,576.37 to be increased annually by some \$3,500.00 per year.

On November 10th, 1953 (the complaint having been filed August 29th, 1953, and service being had upon all appellants except appellant Violet Kellerstraus) appellants, E. R. Errion, Amy Errion, and C. W. Williamson, together with other defendants, filed a motion to dismiss plaintiff's complaint on the grounds that the complaint did not state facts sufficient to constitute a cause of action; that it did not support a cause of action under the Securities Exchange Act of 1934 and that the action was barred by the statute of limitations (R. 40, 41, Vol. II). Order denying motions to dismiss was entered February 5th, 1954 (R. 45, 45, Vol. II).

The action having been set for trial for November 3rd, 1954, on September 1st, 1954, Stanley Soderland, the then attorney for all of the defendants except defendants Glaser, filed notice of withdrawal (R. 74, Vol. II). By written order this withdrawal was approved by the District Court October 1st, 1954 (R. 83, 84, Vol. II).

On October 27th, 1954, present counsel for appellants entered notice of appearance for appellants E. R. Errion, Amy Errion, C. W. Williamson and two other defendants who were subsequently dismissed from the action (R. 91, Vol. II), and on the same day filed motion to vacate trial setting and for continuance (R. 94, Vol. II). The motion to vacate and for a continuance was supported by affidavid of counsel (R. 92, Vol. II) and by the affidavit of Herman A. Dickel, M.D., and Blair Holcomb, M.D. (R. 95, 96, Vol. II).

On October 22nd, 1954, John H. Collacutt, a deputy sheriff, of the County of Multnomah, State of Oregon, filed return of personal service upon defendant Violet Kellerstraus (R. 86, Vol. II). On November 3rd, 1954, present counsel for appellants entered a special appearance and motion to quash service in behalf of Violet Kellerstraus upon the ground that she was not personally served with process and the court lacked jurisdiction over her person. Affidavits in support of the motion were filed (R. 103, 104, Vol. II).

During the course of the trial the court took oral evidence upon the question of the service alleged to have been made upon Violet Kellerstraus (R. 5, 21-562). During this testimony the deputy sheriff conceded that

his return of service was false; that he had not made personal service upon Violet Kellerstraus and sought to uphold his service by substituted service upon Fred Errion (R. 554).

Appellant, Violet Kellerstraus' motion to quash service and to dismiss was denied (R. 1066, R. 108, Vol. II).

Shortly after the beginning of the trial, on November 3rd, 1954, counsel for defendants, E. R. Errion, C. W. Williamson, Bones and Cora Scott, renewed his motion for continuance of the action predicated upon the inability of the principal defendant, E. R. Errion, to be present in court to testify and supported that motion by the testimony of Herman A. Dickel, M.D., a physician practicing in Portland, Oregon, and specializing in the practice of psychiatry. The motion was denied (R. 85, 86).

The trial in the District Court consumed seven trial days. Plaintiff called twenty-one (21) witnesses and either read from or introduced five depositions. Insofar as this appeal is concerned plaintiff's two principal witnesses were plaintiff, herself, and defendant, Dwight Holdorf.

Plaintiff's testimony was substantially in accord with the allegations of her complaint as permitted by the court to be amended respecting the sale of her securities, and throughout the testimony she sought to place the entire onus upon defendant, E. R. Errion. Briefly, plaintiff testified that the transactions upon which she sought relief occurred in the fall of 1949 and that all of her dealings were principally and primarily with de-

fendant, E. R. Errion. There was admitted in evidence, however, as defendants' Exhibit A3 (R. 830) a promissory note dated September 12th, 1949, payable to plaintiff's order in the amount of \$24,624.11 and signed "E. R. Errion." Plaintiff admitted that her signature appeared upon the back of the note (R. 201). (The above sum represented the sale price of plaintiff's securities). Plaintiff also admitted that in March of 1952 in another action she had testified in a deposition that the only transaction she had with defendant, E. R. Errion, was to loan him between \$20,000.00 and \$30,-000.00 for which she received a promissory note; that thereafter this note, together with other properties, was turned over, not to Errion, but to the Holdorf Oyster Corporation in exchange for tide lands (R. 204-211).

Plaintiff also admitted on cross-examination that she put her signature upon a receipt which was signed by the Holdorf Oyster Corporation and indicated the list of plaintiff's properties which were turned over by plaintiff to the Holdorf Oyster Corporation. The receipt, a copy of which was originally introduced as defendants' Exhibit A-4 (R. 216) was later admitted in evidence as defendants' A-5 (R. 244). It was dated October 19th, 1949. Plaintiff admitted that on the deposition previously referred to she had testified that all of the documents signed by her were delivered to defendant, Dwight Holdorf, in behalf of the Holdorf Oyster Company, and that that was true and correct (R. 239).

Defendant, Dwight Holdorf, called as a witness by

plaintiff, also sought to place the entire onus and burden upon defendant, E. R. Errion. It would not be helpful to the court to relate Holdorf's testimony in detail, principally because he was completely and wholly impeached on each and every statement made by him on the witness stand. Pages 73 to 922 of the record contain a detailed resume of impeaching statements made by Holdorf at the time of the taking of his deposition in this action, to-wit, January 30th, 1954.

The Trial Court in his oral decision following the trial and on December 29th, 1954, conceded that the testimony of plaintiff had been impeached (R. 1075) and stated unequivocably that Dwight Holdorf's testimony is not to be relied upon because it was certainly impeached (R. 1076).

Insofar as appellants, Amy Errion, C. W. Williamson and Violet Kellerstraus are concerned, each participated in only a minute portion of the entire transaction and Williamson and Kellerstraus had nothing whatsoever to do with the transaction until long after the transfer of any of plaintiff's property or the receipt by plaintiff of any oyster lands in consideration therefor.

The only actions of defendant, Amy Errion, were respecting the sale of plaintiff's corporate securities which she testified was a loan transaction between the plaintiff and E. R. Errion (R. 96); the testimony of plaintiff that Amy Errion did some typing for her (R. 161), and the fact that Amy Errion and Mrs. Connell, plaintiff, in 1950 took a trip to Southern California (R. 117).

Amy Errion testified unequivocably that she was acting for plaintiff in the sale of plaintiff's stock in September of 1949; that she had no knowledge of any of the other transactions testified to by plaintiff; that she had typed none of the papers or documents for plaintiff and in 1949, 1950, 1951 did not participate personally in any of her husband's business affairs (R. 1014, 1015).

Respecting appellant, C. W. Williamson, the only manner in which he could conceivably be connected with the matters testified to by plaintiff was in connection with the subsequent lease of the oyster lands from Mrs. Connell to Williamson. The lease was dated December 14th, 1950, and was admitted in evidence as plaintiff's Exhibit 4 (R. 134). Williamson's testimony concerning that transaction appears commencing at page 1025 of the record.

The only connection which could conceivably be alleged as far as defendant, Violet Kellerstraus, is concerned is that she is the sister of E. R. Errion and that she had the record title to one of the pieces of plaintiff's property in her name at the time it was sold in 1953, June 5th, 1953, to be exact. Violet Kellerstraus testified that she had merely done what defendant, Dwight Holdorf, had asked her to do and had not discussed the transaction in any respect with her brother, E. R. Errion (R. 585).

### **Ruling of District Court**

In addition to the rulings made during the course of the trial and which have previously been referred to, at the conclusion of plaintiff's case defendants Errion and wife, Williamson, Cora Scott and Bones, renewed their challenge to the jurisdiction of the court and challenged the sufficiency of the evidence. At the same time the motion in support of the special appearance to quash service upon defendant, Violet Kellerstraus, was renewed. The District Court granted the motion to dismiss as to the defendants, Bones and Scott, and denied the remainder of the motions without prejudice (R. 1010).

At the conclusion of all of the evidence counsel for appellants renewed their motion for continuance upon the ground and for the reason that the principal defendant, E. R. Errion, was unable to be present (R. 1056) which motion was denied by the District Court (R. 1057).

Likewise at this time counsel for appellants renewed the motion for dismissal and challenge to the evidence in favor of defendants, Errion, Amy Errion and Williamson (R. 1060). The court reserved decisions upon these motions (R. 1060).

On December 29th, 1954, the District Court heard argument and thereafter granted the motion for dismissal on behalf of defendant, Glaser, denied the remaining motions and directed that judgment be entered in favor of plaintiff and against appellants and the other defendants (R. 1065-1079).

Findings of fact, conclusions of law, and final judgment were signed and entered January 17th, 1955 (R. 107, 140A, Vol. II). Order denying defendants' motion for judgment notwithstanding judgment and in the alternative for a new trial was entered February 9th, 1955 (R. 142, Vol. II).

# **QUESTIONS INVOLVED**

As a result of the District Court's rulings in denying appellants' motions for continuance, and denying the motion of defendant, Violet Kellerstraus, to quash service of summons upon her, in overruling appellants' respective challenges to the sufficiency of the evidence, and in entering judgment against appellants, the following questions are presented to this court for determination:

- 1. Whether the Securities Exchange Act of 1934 and Rule X-10 B-5 of the Securities and Exchange Commission confers jurisdiction upon the United States District Court for the Western District of Washington over appellants, each of whom were and are residents of the State of Oregon.
- 2. Whether plaintiff's cause of action predicated upon an alleged fraudulent transfer of property in October, 1949, is barred by the statute of limitations.
- 3. Whether the judgment of February 17th, 1955, is supported by the findings of fact and conclusions of law as to appellants and each of them.
- 4. Whether the findings of fact and conclusions of law are supported by the evidence as to appellants and each of them.
- 5. Whether the United States District Court abused its discretion in denying appellants' motion to vacate the trial setting and for a continuance.
- 6. Whether the United States District Court erred in denying the motion of defendant, Violet Kellerstraus to quash service of summons.

#### III.

#### SPECIFICATION OF ERRORS

The District Court erred:

- 1. In holding that the District Court had jurisdiction of these appellants under the Securities Exchange Act of 1934 and Rule X-10 B-5 of the Securities and Exchange Commission, and in overruling appellants' objections to the jurisdiction of the District Court.
- 2. In holding that plaintiff's cause of action was not barred by the statute of limitations and in overruling appellants' objections that the action was not commenced within the time limited by law.
- 3. In entering judgment against appellant, E. R. Errion.
- 4. In entering judgment against appellant, Amy Errion.
- 5. In entering judgment against appellant, C. W. Williamson.
- 6. In entering judgment against appellant, Violet Kellerstraus.
- 7. In entering judgment against appellants and each of them for the reason that said judgment as to appellants and each of them is not supported by the findings of fact, conclusions of law or the evidence in this action.
- 8. In entering Findings of Fact No. IX insofar as it refers to an alleged fraudulent transaction with defendant, E. R. Errion.
- 9. In entering Finding of Fact No. X insofar as it relates to an alleged single transaction with E. R.

Errion, insofar as said finding refers to the promissory note of September 12th, 1949, as being considered by plaintiff as a receipt, insofar as it refers to participation by Amy Errion in any of the transactions therein set forth and insofar as the court finds that there was only one single and indivisible transaction and that appellant, E. R. Errion, participated in any extent beyond the issuance of his promissory note of September 12th, 1949.

- 10. In entering Findings of Fact No. XI, XII, XIII and XIV insofar as they relate to defendant, E. R. Errion.
- 11. In entering Finding of Fact No. XV insofar as it relates to alleged untrue statements of material fact made by defendant, E. R. Errion.
- 12. In entering Finding of Fact No. XVI insofar as it relates to alleged untrue representations as to the future and/or promises alleged to have been made by defendant, E. R. Errion.
- 13. In entering Finding of Fact No. XVII insofar as it relates to alleged omissions to state material facts alleged to have been omitted by defendant, E. R. Errion.
- 14. In entering findings of fact No. IX and XX insofar as it is found that defendant, E. R. Errion, persuaded plaintiff not to go to Coos Bay, Oregon, to refrain from discussing her transactions with others and permitted plaintiff to continue to live rent free in her home in Seattle.
  - 15. In entering Finding of Fact No. XXI insofar as

it is found that defendant, E. R. Errion, arranged for defendant, Amy Errion and plaintiff to visit and travel in California in 1950 insofar as it is found that the purpose of said trip and visit was to hinder plaintiff and insofar as it is found that these facts were well known to defendant, Amy Errion.

- 16. In entering Finding of Fact No. XXIII insofar as it relates to action and representations of defendant, E. R. Errion, together with knowledge of defendant, Amy Errion, in respect to the lease dated December 14th, 1950, and insofar as it relates to knowledge of C. W. Williamson respecting the alleged purpose of said lease.
- 17. In entering Finding of Fact No. XXIV insofar as it respects actions and directions of defendant, E. R. Errion.
- 18. In entering Finding of Fact No. XXV insofar as it relates to defendant, Violet Kellerstraus, and her actions as an alleged part of a scheme to defraud plaintiff, together with the knowledge alleged to have been had by Violet Kellerstraus of such transactions.
- 19. In entering Finding of Fact No. XXVII insofar as it relates to alleged representations and inducements made by defendant, E. R. Errion, and plaintiff's alleged reliance thereupon.
- 20. In entering Finding of Fact No. XXVIII insofar as it relates to the purpose and intent of each and all of appellants, and insofar as it relates to plaintiff's knowledge of the transaction and discovery of the facts thereof.

- 21. In entering Finding of Fact No. XXIX insofar as it relates to the use of the mails, instrumentalities of Interstate Commerce and facilities of a National Security Exchange by appellants.
- 22. In entering Finding of Fact No. XXX insofar as it relates to transfer of property to E. R. Errion and action by appellants in disposing of plaintiff's securities and other property.
- 23. In entering Finding of Fact No. XXXI insofar as it relates to alleged knowledge of appellants and each of them and their alleged acting in concert and tacit agreement to defraud plaintiff and violate the Securities Exchange Act of 1934 and the rules and regulations of the Securities and Exchange Commission.
- 24. In entering Finding of Fact No. XXXII insofar as it provides for a money judgment against appellants and each of them.
- 25. In entering Findings of Fact No. XXXIV, XXV and XXXVI insofar as they relate to transactions with any of appellants.
- 26. In entering Conclusion of Law No. 1 insofar as it holds that appellants or any one of them by their conduct and contracts violated the Securities Exchange Act of 1934 and the rules and regulations of the Securities Exchange Commission.
- 27. In entering Conclusion of Law No. 3 insofar as judgment was directed to be rendered against appellants and each of them.
- 28. In overruling and denying appellants' motion to vacate the trial setting and for a continuance.

- 29. In overruling and denying the motion of defendant, Violet Kellerstraus, to quash service of summons upon her.
- 30. In denying appellants' motion for judgment notwithstanding the judgment and in the alternative for a new trial.

#### IV.

#### SUMMARY OF ARGUMENT

Appellants' argument upon this appeal will be presented under four principal subdivisions as follows:

1. The District Court lacked jurisdiction over appellants and each of them and over plaintiff's alleged cause of action against appellants for the reason that plaintiff did not establish that any act or transaction constituting a violation of the Securities Exchange Act of 1934 or any rule of the Commission promulgated thereunder occurred within the jurisdiction of the United States District Court for the Western District of Washington. It is appellants' contention that the only securities of plaintiff involved in any of the testimony was her corporate stock which was turned over to E. R. Errion in the nature of a loan and represented by a promissory note signed by Errion, September 12th, 1949 (defendants' Exhibit A-3). It is not established by the evidence that this transaction took place within the jurisdiction of the United States District Court for the Western District of Washington. Thereafter in an entirely separate and divisible transaction plaintiff transferred certain of her properties, including the promissory note, to the Holdorf Oyster Corporation.

- 2. The transfer of plaintiff's properties took place in August, September and October, 1949, being finally consummated October 19th, 1949, as shown by defendants' Exhibit A-5. Plaintiff's complaint was not filed until August 31st, 1953. Plaintiff did not establish by credible evidence that she failed to discover the fraud worked upon her until some time subsequent to January 1st, 1951, as alleged in her complaint, for under the applicable law the statute of limitations on a fraud action begins to run when the fraud should have been discovered, and a clue to the fact, which if followed up diligently, would lead to discovery is in law equivalent to discovery. The action is barred by the statute of limitations.
- 3. The judgment of February 17th, 1955, as to each of appellants is not, and the respective findings of fact as to each of the appellants are not supported by the evidence. As to defendants, Amy Errion, C. W. Williamson and Violet Kellerstraus, there is no evidence whatsoever to establish their participation in or knowledge of any fraudulent scheme to an extent which would justify the judgment of the District Court. As to defendant, E. R. Errion, the judgment must of necessity rest upon the testimony of plaintiff and the testimony of defendant, Dwight Holdorf. The testimony of each was completely impeached in all substantial particulars and thus cannot support a judgment against this defendant. If there were fraud, which we deny, plaintiff is in "pari-delicto" with defendants and thus cannot recover.
  - 4. It was a grievous and material abuse of discretion

for the District Court to deny to appellants and particularly to appellant, E. R. Errion, the motion for a vacation of the trial setting and for a continuance. It is abundantly apparent from the language in plaintiff's complaint and even more apparent from the testimony of plaintiff and defendant, Dwight Holdorf, together with others testifying in behalf of plaintiff, that a studied and concerted effort was made to place the entire onus of the matters complained of by plaintiff upon defendant, E. R. Errion. E. R. Errion, through no fault of his own, and by reason of grievous illness, was unable to appear and defend himself. The testimony of Dr. Herman A. Dickel is undisputed and uncontroverted and for the court to deny the motions to vacate the trial setting and for a continuance was an abuse of discretion as to all of appellants.

5. No proper service was had upon defendant, Violet Kellerstraus. The affidavit of personal service filed by the deputy sheriff of Multnomah County was admittedly false and the court lacked jurisdiction of this defendant.

Before commencing a detailed argument upon each of the above five subdivisions, we feel compelled to state candidly that we shall make no attempt to present argument respecting each and all of the findings to which we have assigned error. Plaintiff submitted and the District Court signed thirty-six (36) separate findings of fact. They appear in the record at pages 107 to 140 inclusive. In order to protect our record, we have felt it necessary to assign error to twenty-four (24) of such findings and to three conclusions of law. To even

attempt a detailed discussion of these findings and conclusions, together with the evidence relating thereto would extend this brief beyond conceivable reason. We believe, however, that the various matters assigned as error will be adequately covered in the argument to be presented and we do not intend to waive any assignment of error.

#### V.

#### **ARGUMENT**

1. The District Court Lacked Jurisdiction over Appellants and each of Them and over Plaintiff's Alleged Cause of Action Against Appellants for the Reason That Plaintiff Did Not Establish that Any Act or Transaction Constituting a Violation of the Securities Exchange Act of 1934 or any Rule of the Commission Promulgated Thereunder Occurred within the Jurisdiction of the United States District Court for the Western District of Washington.

Plaintiff has sought to obtain jurisdiction of the United States District Court for the Western District of Washington under and pursuant to Section 10b, Section 27 and Section 29b of the Securities Exchange Act of 1934, together with Rule X-10b -5 as promulgated by the Securities and Exchange Commission. Inasmuch as each of appellants was and is a resident of the State of Oregon, the jurisdiction, if any, therefor, must come within the purport and language of Section 27 of the act and it must be established that an act or transaction constituting a violation of the Securities Exchange Act of 1934 or Rule X 10b-5 occurred within the jurisdiction of the United States District Court for the Western District of Washington.

While it is undisputed that on September 12th, 1949, certain corporate stock of the plaintiff in a loan transaction was turned over to E. R. Errion and sold on the stock exchange, no fraud is alleged or established respecting such transaction. It is not contended that the stock was sold for a lesser value than its market value and in fact the proof is exactly to the contrary.

In point of fact it is not even established in the evidence that this transaction as between E. R. Errion and plaintiff even occurred within the jurisdiction of the United States Court for the Western District of Washington.

Thereafter, in an entirely separate transaction, plaintiff turned over to defendant, Dwight Holdorf, acting for the Holdorf Oyster Corporation the said promissory note and deeds to certain of her properties together with other personal properties (R. 239). None of the properties involved with the possible remote exception of the promissory note could be classified as securities within the meaning of the act.

The very language of the act as analyzed by this court in the case of Fratt v. Robinson, 203 F.(2d) 627 (C.A. 9, 1953) indicates that the purpose of the act was to control security transactions by regulation of security-transfer businesses and persons who function in or through them. As this court said in referring to the reasoning of other United States courts, "There is one phase common to the reasoning of all the cases: Section 10 is in aid of the end sought by the act, to-wit, the lessening of fraudulent and sharp practices in the securities market."

Nowhere in the congressional record is there any evidence or even hint that Congress meant to reach such activities as alleged in Plaintiff's complaint. Security transactions on the exchanges and acts directly related thereto were the practices Congress intended to reach by the Securities Exchange Act of 1934.

Not only does Section 10(b) of the act and Rule X-10b-5 thereunder not have the extremely broad application plaintiff believes it does, but its application has been restricted even in matters primarily concerning dealings in securities. Joseph v. Farnsworth Radio & Television Corp., 99 F.Supp. 701 (D.C., S.D., N.Y., 1951), involved the attempt to recover from defendants the difference between what plaintiffs paid for stock in the corporate defendant and that which they would have paid had the defendants not remained mute while selling their stock in the company because of knowledge of its precarious plight. District Judge Sugarman, in dismissing the complaint for failure to state a cause of action, stated:

"Nothing in the history of the Act or the Rule (X-10 (5)-5) permits the far-reaching effect sought herein by the plaintiffs \* \* \* "

This decision was affirmed in *Joseph v. Farnsworth Radio & Television Corp.*, 198 F.(2d) 883 (2 C.C.A. 1952).

A note on "Purchase of Securities by 'Any Person'," 44 Ill. L. Rev. 841 (1950) concludes that the sanctions of the Exchange Act and Rule X-10b-5 "still apply only to insiders and broker-dealers."

Plaintiff's complaint alleges that she was the owner of certain properties including corporate securities on October 19th, 1949, and on that day transferred all of her properties to defendants (R. 6115—Vol. II). Proof of this allegation, of course, failed completely, and even after the trial amendment invited by the trial court (which we felt and do now feel was error) plaintiff did not establish any violation of the act respecting "securities" as defined by the act and which occurred within the jurisdiction of the United States District Court for the Western District of Washington.

Failure to prove an act or transaction occurring within the jurisdiction of the trial court in violation of the Securities Exchange Act of 1934 or the rules of the commission means simply and positively that the court lacked jurisdiction of appellants who were residents of Oregon, and lacked jurisdiction of the subject matter of the action itself.

2. The Relief Sought by Plaintiff Is Predicated Upon the Alleged Damage Occurring to Her by Reason of the Transfer of Her Properties which Transfer Occurred in August, September, and October of 1949. Nothing which Took Place Following October of 1949 Gave Rise to Any Cause of Action, and Plaintiff's Cause of Action, if any, Was Complete Certainly by October 29th, 1949. It Is Barred, Therefore, by the Statute of Limitations.

Since the federal act provides no limitation, the applicable statute of limitations is the statute of the State of Oregon or the statutes of the State of Washington. The applicable Oregon statute of limitations covering relief on the ground of fraud is two years. Oregon Rev. Statutes 12.110.

The applicable Washington statute covering relief predicated upon fraud is three years. Rem. Rev. Stat. Sec. 159 (4).

Each statute provides that the cause of action in such a case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting fraud. Ore. Rev. Stat. 12.110; Rem. Rev. Stat. 159 (4).

Plaintiff's action was not commenced until the filing of her complaint August 31st, 1953, which was almost four years from the time her properties had been transferred.

In the relatively late case of *In re Sackman's Estate*, 34 Wn.(2d) 864, 210 P.(2d) 682, the Washington Supreme Court held that the three-year Washington statute for actions based on fraud begins to run when the fact which, if followed up diligently, would lead to discovery, is in law equivalent to discovery. The court further held that the mere fact that one may have confidence in a relative or relatives (even more applicable to a stranger) does not in and of itself establish a fiduciary relation and is not sufficient to excuse a lack of diligence in investigating to discover fraud.

Plaintiff now contends that the promissory note of September 12th, 1949, was thought by her to be a receipt and not a note. Apparently she discussed her affairs with others and most anyone of even subnormal intelligence could have explained to her what the document was, so too with the other facts relied upon by plaintiff. Any diligence upon her part would have disclosed specific information concerning the oyster lands

around Coos Bay, the title thereto and if necessary, the history of such oyster lands, together with all other facts concerning the transaction.

We respectfully submit that plaintiff's testimony that she did not discover the alleged fraud until some time subsequent to December of 1950 is absolutely incredible.

Assuming the transactions to be fraudulent as contended for by plaintiff, certainly she must in law be deemed to have discovered the fraud prior to August of 1950 (applying the Washington statute) and beyond any question of doubt, prior to August of 1951 (applying the Oregon statute).

This action as against each and all of appellants is barred by the statute of limitations.

In this connection it is worthy of note that the District Court in finding No. 28 (R. 134, Vol. II) merely recites that plaintiff did not discover or have any reason to discover facts that revealed to her that she had been defrauded until well within three years from the time she commenced the action. This finding is not only not supported by the evidence, but is insufficient to sustain the judgment.

3. The Judgment of February 17th, 1955, As to Each of Appellants Is Not and the Respective Findings of Fact As to Each of the Appellants Are Not Supported by the Evidence.

Plaintiff's action for relief is upon the ground of fraud and the Washington and Oregon law relative to common law fraud is applicable.

The fact that plaintiff has endeavored to invoke the

jurisdiction of the federal courts pursuant to the Securities Exchange Act of 1934 does not change the nature of her action. The action is one for relief predicated upon common law fraud and this court has so held in the case of *Fratt v. Robinson*, 203 F.(2d) 627 (C.A. 9, 1953). In that case appellees contended that the two-year statute of limitations applied, in that the action arose out of a statute. In answering that contention this court said:

"In a sense, of course, the instant action is based upon a statute, but it is also based upon fraud which has been the subject of common law concern through the centuries. And, of course, the Washington state law recognizes such an action. The authors of 53 C.J.S., Limitations of Actions, Sect. 83 (a), at page 1052, have deduced the following from the authorities:

66 \* \* \*

"The prase "liability created by statute" or "liability created by law," within the meaning of such a statute, has been held not to include or extend to actions arising under the common law,

\* \* \* \* '

"Appellees argue that the basis of the federal statute is the use of the mails or other instrumentality of interstate commerce, therefore the action arises from a statute and the two-year limitation applies. But, of course, the use of the mails per se is not denounced, it is the fraud that offends. For that reason, it denies the use of the mails in connection with the fraud. Here is not a governmental statutory denouncement of a human action heretofore undenounced, such as a violation of a wartime price for a commodity. Fraud is denounced in all its phases by federal and state and the common

law. There are statutes with restrictions and limitations as to actions under it, but such actions do not arise out of nor upon a statute, within the meaning of the Washington state law. To hold otherwise would be paying tribute to form inconsistent with the spirit and substance of the rule.

"What we have said appears to be borne out by the Washington State Supreme Court in the case of *Union Trust Co. v. Amery*, 1912, 67 Wash. 1, 120 P. 539, 540. That action was based upon a Washington statute which declared unlawful, among other acts, the making of any division of the stock of a corporation except from profits. It was claimed by defendants that the statute of limitations had run. The court thought otherwise, and held the applicable limitation was that provided for actions based upon fraud."

In Melton v. United Retail Merchants, 24 Wn.(2d) 145, 163 P.(2d) 619, the Supreme Court of the State of Washington said:

"If there be such presumptions as are relied on by respondent, which we gravely doubt, they must certainly give way to the ancient and familiar rule—or rather, maxim, for it is so classified in the law books—that: 'Fraud is never presumed, but must be proved.' The Roman version is perhaps the better, for in two less words, it not only states the maxim, but also the reason on which it is based 'Fraus est odiosa et non pro sumenda' (Fraud is odious and not to be presumed).

"'It follows from the rule that fraud will not be presumed that the burden of proving fraud rests on the party who relies on it either for the purpose of attack or defense.

"The rules which impose the burden of proof

on one alleging fraud and which deny a presumption of fraud rest on the fact that fraud is regarded as criminal in its essence, and involves moral turpitude at least, while, on the other hand, the presumption is that all men are honest, that individuals deal fairly and honestly, that private transactions are fair and regular, and that participants act in honesty and good faith. The presumption is against the existence of fraud and in favor of innocence, the presumption against fraud approximating in strength the presumption of innocence of crime \* \* \* (Emphasis supplied by the court) 37 C.J.S. 398, Fraud, Sec. 95."

In Cerckonek v. Dibble, 42 Wn.(2d) 451, 256 P.(2d) 488, the Washington Supreme Court said:

"And we have repeatedly held that the burden is upon the person who alleges fraud to establish it by evidence that is clear, cogent and convincing." (Citing cases.)

The Oregon rule is almost identical. See *Miller et ux*. v. *Protrka*, et ux., 193 Ore. 585, 238 P.(2d) 753, together with the case of *Metropolitan Casualty Insurance Co*. v. *Lesher*, 152 Ore. 161, 52 P.(2d) 1133, wherein many Oregon decisions on the burden of proof in fraud cases are reviewed and the court quoted from the case of *Wimer v. Smith*, 22 Ore. 469, 30 Pac. 416, as follows:

"On a charge of fraud, the burden of proof is on the party alleging it. The defendants must clearly and distinctly prove the fraud or false representations they allege. The law in no case presumes fraud. The presumption is always in favor of innocence, and not guilt. Fraud must be proved, but it may be proved by circumstances from which no other inference but that of fraud can be drawn. The rule is, that when proven by circumstances, they must afford a strong presumption. (Juzan v. Toulmin, 9 Ala. 662; S.C. 44 Am. Dec. 448.) Circumstances of mere suspicion will not warrant the conclusion of fraud. (Taylor v. Fleet, 4 Barb. 95; Clarke v. White, 12 Pet. 178.) 'The evidence of it,' Chancellor Kent said, 'must be clear, strong, and satisfactory.' (Boyd v. Mclean, 1 John's Ch. 582; Gillespie v. Moon, 2 id. 585.) And so likewise said the learned and eminent Dillon J., in Geib v. Ins. Co., 1 Dill, C.C. 443. In no doubtful manner does the court lean to the conclusion of fraud: it is not to be assumed on doubtful evidence. If the fraud is not clearly and strictly proved as alleged, relief cannot be had, although the party against whom relief is sought may not have been perfectly clear in his dealings. (Mowatt v. Blake, 31 L.T. 387.) The facts constituting fraud must be clearly and conclusively be proved by the preponderance of the testimony \* \* \* \* '' (Citing texts)

The leading Washington decision upon the necessary elements of fraud is Webster v. Romano Engineering Corp., 178 Wash. 118, 34 P.(2d) 428 which has been cited with approval in numerous later Washington decisions including the case of Dobbin v. Pacific Coast Coal Co., 25 Wn.(2d) 190, 170 P.(2d) 642, wherein the court said:

"Of all civil liabilities, fraud is the most difficult to establish."

The Oregon rule is identical. See Counzelmann v. N.W.P. & D. Prod. Co., 190 Or. 332, 225 P.(2d) 757, and Musgrave et ux. v. Lucas et ux., 193 Or. 401, 238 P.(2d) 780.

With the foregoing principles of law in mind, let us

briefly examine the evidence in support of the judgment and the several findings as to each of the appellants.

# (A) Evidence as to Amy Errion.

The only evidence as to Amy Errion consists in Mrs. Connell's testimony that Amy was present in her home on numerous occasions and did some typing for her in connection with her business (denied by Amy Errion); that Amy Errion accompanied Mrs. Connell to California in 1950 which is undisputed (there is not one word in the testimony which would give rise to any inference therefrom); that Amy Errion sold Mrs. Connell's corporate securities in September of 1949 (which related solely to the separate and distinct promissory note transaction); and the fact that she was the wife of E. R. Errion. The latter fact seems to have been of primary importance to the trial court in his decision as appears on page 1072 of the record.

It will be readily seen that none of the testimony relating to Amy Errion comes with the rulings of the Washington and Oregon courts insofar as fraud actions are concerned.

### (B) C. W. Williamson

The only testimony relating to appellant, Williamson, is in connection with the lease of December, 1950. There is no showing whatsover that he had any knowledge of the transfer of plaintiff's properties to anyone, or that he had any connection whatsoever with any of the matters testified to by plaintiff until more than a year after all of the properties had been transferred.

As we have previously stated the gravamen of plaintiff's action is fraud in inducing her to transfer her properties in the fall of 1949, and once again, it is exactly contrary to the rules as established by the Washington and Oregon courts to hold appellant, Williamson, liable in this action.

### (C) Violet Kellerstraus

Violet Kellerstraus is the sister of E. R. Errion. Her apartment adjoins his in Portland. For a time they had a joint bank account and at the request of defendant, Holdorf, the title to one of the properties originally belonging to plaintiff was placed in Violet Kellerstraus' name and later sold by her. The actual sale took place in 1953.

Once again, unless we are to presume fraud and to ignore the requirements as established by the courts of both Washington and Oregon, we cannot find Violet Kellerstraus guilty of fraud in this action. There is not one word of testimony that she had any part or knowledge in inducing plaintiff to dispose of her properties in the slightest particular.

### (D) E.R. Errion

If this judgment is to be sustained against appellant, E. R. Errion, it must necessarily be upon the testimony of plaintiff and the testimony of defendant, Dwight Holdorf. The testimony of neither was "clear, cogent and convincing."

Despite her studied endeavor at the time of trial to place the entire blame for anything which occurred upon defendant, Errion, we respectfully submit that her testimony falls far short of the required clarity and credibility in that she was impeached on almost every important item of her testimony.

The court will recall that plaintiff testified upon an earlier deposition in another action that her entire dealings were with the Holdorf Oyster Corporation and Dwight Holdorf with the exception of one transaction with Errion wherein she loaned him some twenty-four-odd thousand dollars and took his promissory note for it (R. 204-211). Obviously this is the corporate stock loan transaction in August and September of 1949 and under plaintiff's testimony alone the judgment cannot he supported against Errion.

Dwight Holdorf's testimony is even less convincing. In the trial of a very considerable number of civil cases over the past twenty years, the writer of this brief does not recall ever observing a witness who was more completely impeached than was defendant Dwight Holdorf. In order to save the time of the court in a trial which had already been unduly extended, and by stipulation of counsel, we merely read from his deposition the impeaching statements made by him at that time and did not follow the usual procedure of reading each statement and then asking the witness if he so testified. Notwithstanding this, however, 49 pages of the record consist of this impeaching testimony (R. 873-922).

It is clearly apparent by now, that from the commencement of this action plaintiff has made a studied and deliberate effort to vilify defendant E. R. Errion, commencing with the language used throughout her complaint, the numerous affidavits filed during the pendency of the action, and in a deliberate attempt throughout the trial of plaintiff and her witnesses to place the entire blame upon him. This animosity is clearly indicated by the witness Bynon, who testified that she worked for Mr. Errion for some six months, left his employ at 3:00 o'clock in the afternoon of a given day in June of 1949 and met with representatives of the Attorney General's office immediately thereafter (R. 395).

Despite all of this and as previously stated, the judgment against E. R. Errion must rest upon the testimony of plaintiff and defendant Dwight Holdorf. The character of that testimony is not such as to sustain this judgment.

A further ground for reversal of the judgment as against each and every one of the appellants is the situation which, by plaintiff's own testimony and pleadings puts her in pari-delicto with at least one of the appellants. The undisputed testimony is that plaintiff and E. R. Errion attempted to "fix" the value of Coos Bay oyster lands in an admitted attempt to defraud the Port of Coos Bay out of \$150,000.00. When we say undisputed testimony we mean in this connection the testimony of Mrs. Connell, if taken at its face value. She testified that she expected to receive a profit on this transaction. We submit therefore that the case of Paddock v. Todd, 37 Wn.(2d) 711, 225 P.(2d) 876, is directly in point. In that case the Washington court said:

"Concerning respondent's cross-appeal, little need be said. It is very clear that the trial court, in exercise of its equitable powers, was entirely correct in refusing respondent any relief upon his cross-complaint for the reason that both appellant and respondent knowingly entered into a conspiracy to obtain money from Anacortes Veneer, Inc., by falsely representing that appellant was a bona fide stockholder and, as such, entitled to employment under the rules and regulations of the company. Under these circumstances, the parties being in pari delicto, a court of equity will not aid either party in carrying out their fradulent conspiracy. 2 Pomeroy's Equity Jurisprudence (5th ed.) 134, Sect. 402f.'

4. It Was a Grievous and Material Abuse of Discretion for the District Court to Deny to Appellants and Particularly to Appellant, E. R. Errion, the Motion for Vacation of the Trial Setting and for a Continuance.

As we previously indicated, plaintiff, her witnesses and defendant Holdorf, acted in concert together throughout the trial to place the entire onus and blame upon the defendant E. R. Errion.

E. R. Errion was the only witness who could testify in his own behalf. His absence from the trial was testified to by Dr. Herman A. Dickel whose testimony was unimpeached and uncontroverted. Timely motions were made for continuance prior to trial at the commencement and at the conclusion of the trial, and it was an abuse of discretion for the court to deny these motions.

In Harran, et al. v. Morgenthau, 89 F. (2d) 863 (App. D.C. 1937), the Federal court said:

"If there were anything in this record challenging the good faith of the motion for continuance, the professional ability or character or truthfulness of the physicians who made affidavit to the inability of Dunning to appear or even if there were a showing that a continuance would have resulted in serious loss to the other parties, we should not now hesitate to sustain the action of the lower court; but here we are confronted with a case in which, as appears, the plaintiff was his only witness and was so seriously ill that his appearance in court would probably have resulted in his death. Insisting upon a trial in these circumstances must necessarily have resulted in prejudice to Dunning's rights. There may have been good reasons for the refusal to grant the continuance, but if there were it was the duty of counsel to have shown them by the record, for we can know only what the record contains.

"We believe the universal rule in circumstances such as we have outlined above is to reverse the judgment or decree and remand the case for a new trial. Cases so holding, among others too numerous to mention are the following:" (Citing cases)

See also Elliott v. Lawson, 87 Ore. 450, 170 Pac. 925; In re Townsend's Estate, 122 Ia. 246, 97 N.W. 1108; McCutcheon's Adm'r. v. Dean, 246 Ky. 257, 54 S.W. (2d) 926; Karkorian v. Fermanian, 189 N.Y.S. 130, and State v. Harras, 22 Wash. 57, 60 Pac. 58. In the latter case, though upon a different set of facts, the language of the court is particularly important. The Washington Supreme Court said:

"If the defendant has been deprived of the right to make a defense through no failure or neglect of his own, it would be a shame and a reproach to the law to hold him accountable for the law's mistake. The case involves something more than a mere question of the exercise of discretion by the trial judge in refusing an application for a continuance. It involves the larger question of a defendant's right to have witnesses examined in his behalf. It involves the constitutional right of fair trial. No duty which the courts owe society can rise above that of preserving inviolate those principles which make effective the constitutional guarantee of a fair trial. Better, far better, that the course of justice be slow, then that in making haste we should break down those safeguards which experience has shown to be necessary for the welfare and protection of the rights of the citizen."

### No Proper Service Was Had Upon Defendant Violet Kellerstraus and the Court Therefore Lacked Jurisdiction over Her Person.

Plaintiff sought to obtain jurisdiction over defendant Violet Kellerstraus, by an affidavit setting forth personal service upon her in Portland, Oregon. This affidavit being controverted and the court having taken oral testimony in relation thereto, it clearly and unequivocably appeared that the affidavit was false in all particulars, and that no personal or proper substituted service was had upon this defendant.

For this reason and regardless of everything else said in this brief respecting defendant Violet Kellerstraus, the judgment against her must be reversed by reason of the lack of competent service.

#### CONCLUSION

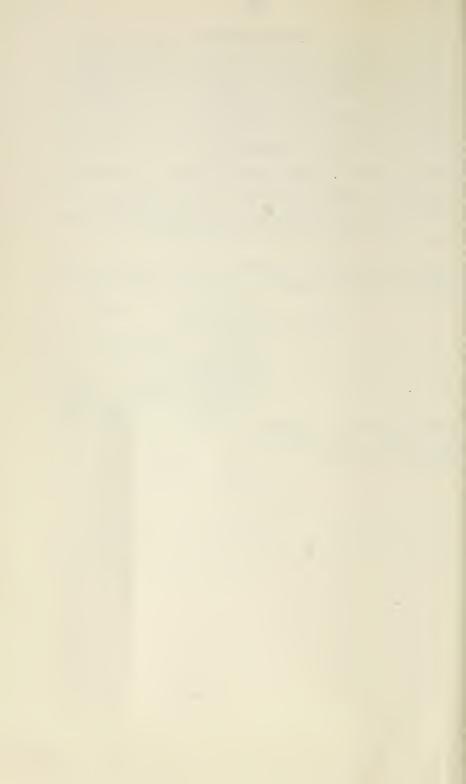
We respectfully submit that the court lacked jurisdiction over these defendants and this cause of action; that the action was not commenced within the time limited by law; that the evidence wholly fails to support the judgment and the findings of fact as to each of the appellants; that the court abused its discretion in denying the motion for vacation of trial setting and for a continuance; and that the court lacked personal jurisdiction over defendant Violet Kellerstraus.

For the reasons above set forth in this brief, the judgment should be reversed.

Respectfully submitted,

OLWELL AND BOYLE
LEE OLWELL
THOMAS C. BOYLE
Attorneys for Appellants

306 Joseph Vance Building Seattle, Washington



### **APPENDIX**

#### STATUTES AND RULE INVOLVED

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. Sect. 78j(b), provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange

\* \* \*

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules, and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule X-10B-5 promulgated by the Commission under Section 10(b), 17 C.F.R. Sect. 240.10b-5, provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrucentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

- (1) to employ any device, scheme, or artifice to defraud,
- (2) to make any untrue statement of a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

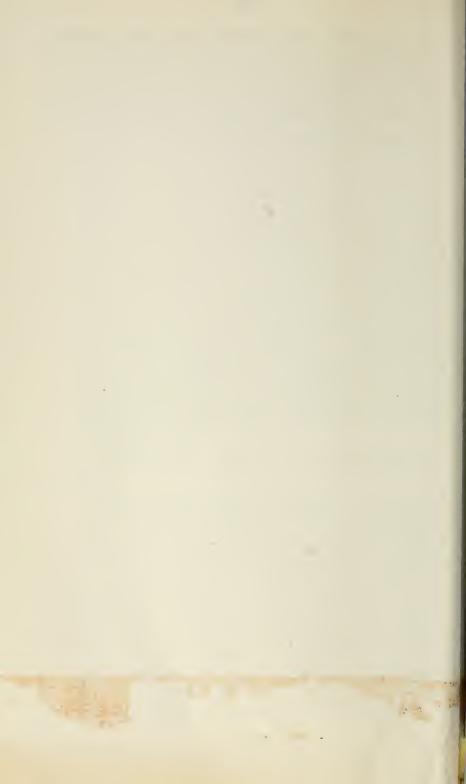
Section 27 of the Act, 15 U.S.C. Sect. 78aa, provides:

The district courts of the United States, the Supreme Court of the District of Columbia, and the United States Courts of any Territory or other places subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

Section 29(b) of the Act, 15 U.S.C. Sect. 78cc(b), provides:

Every contract made in violation of any provision of this title or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this title or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as

regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation: \* \* \*



NINTH CIRCUIT THE FOR APPEALS COURT OF STATES UNITED

MARGUERITE L. CONNELL,

Plaintiff - Appellee,

-VS-

EDGAR ROBERT ERRION, also known as E. R. Errion and Bob Errion, AMY ERRION, VIOLET KELLERSTRASS and C. W. WILLIAMSON,

Defendants - Appellants,

CORA OYSTER INAR · H DWIGHT HOLDORF, OPAL HOLDORF, HOLDORF OR CORPORATION, a Washington Corporation, GLASER, DOROTHY GLASER, KATHERINE GOLD, known as Lee Davenport, also al, DAVENPORT, et SCOTT,

Defendants.

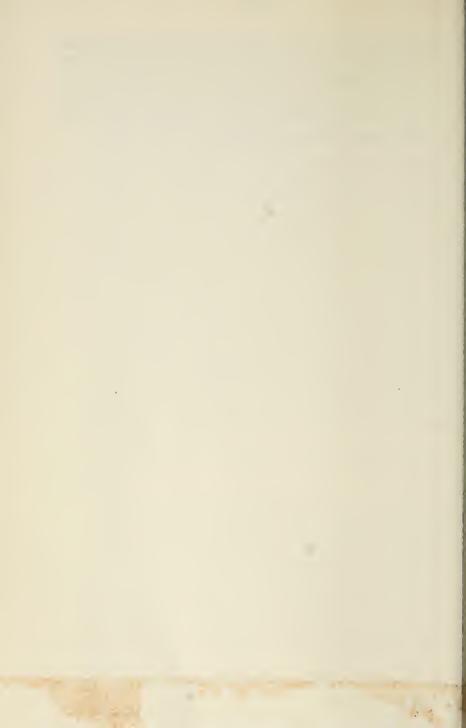
from the United States District Western District of Washington, Northern Division Appeal Court,

# BRIEF OF APPELIEE

William F. White White, Sutherland and White 1100 Jackson Tower Portland, Oregon

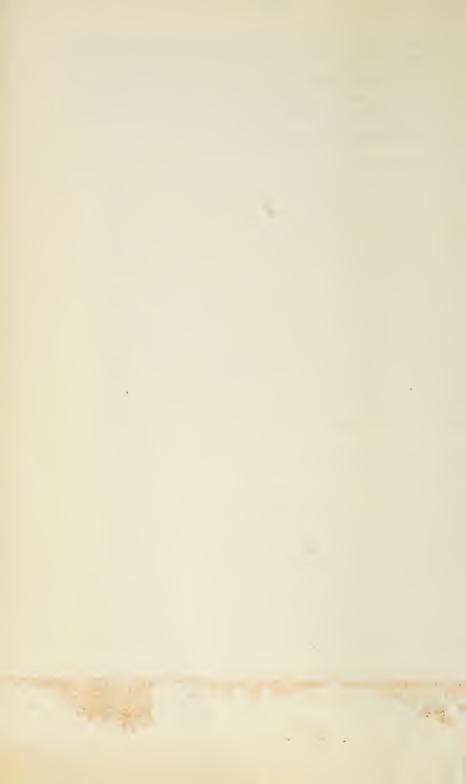
Malcolm S. McLeod 821 Dexter Horton Building Seattle, Washington

Attorneys for Appellee.

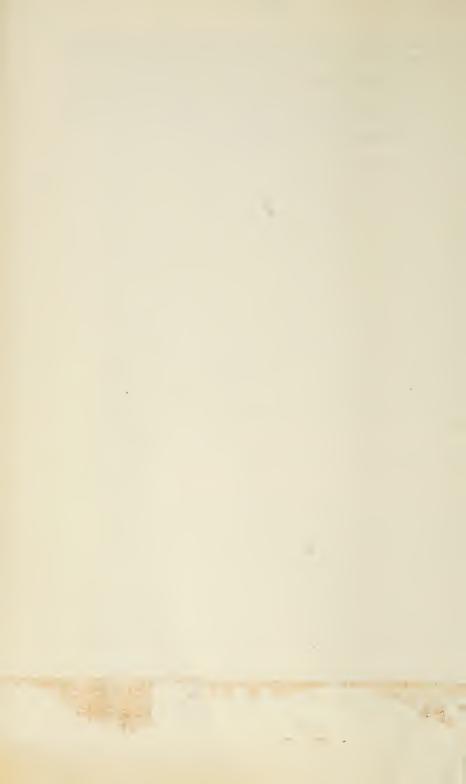


## 

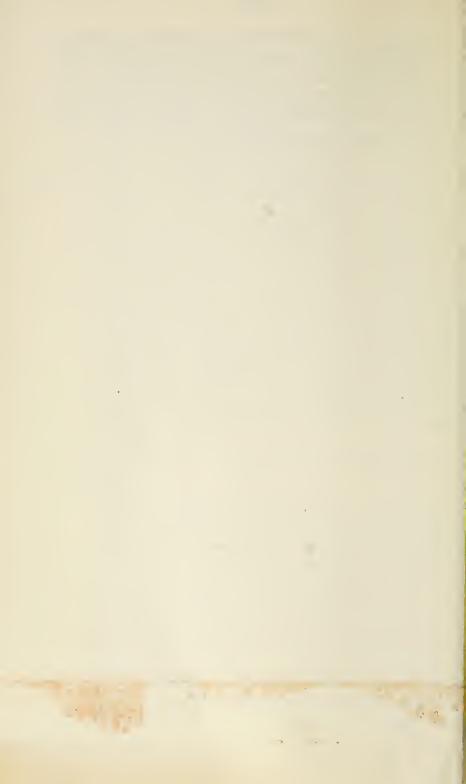
Page	Н	CV	N	5	0	13	17	17	20	27	31	35	40	94
	Appellee's Statement of the Case	THE SCHEME Its conspirators and victim	THE SCHEME Its Inducement phase	THE SCHEME Its principal transaction	THE SCHEME Its conspiratorial phase	THE SCHEME Its "lulling" phase	THE SCHEME Use of instrumentalities of Interstate Commerce	A substantial amount and number of securities were involved in the single indivisible transaction	The District Court had jurisdiction over the cause and parties by reason of Section 10(b) of the Securities and Exchange Act of 1934 and Rule X-10B-5 of the Commission	The "pendent" jurisdiction of the Federal Court is adequate to give it power to determine Appellee's cause respecting the nonsecurities which are comingled with the securities in this single cause for the single fraud	Appellant's contention that trial court lacked jurisdiction because Appellee failed to show a violative act within the Western District of Washington is without merit in fact	Action is NOT barred by either the Statute of Limitations or Laches	Appellants are in error in contending that the trial Court's findings are not supported by the evidence.	Mrs. Connell's part in relation to Port of Coos Bay condemning the "Oyster" land did not place her in pari-delicto with Appellants; hence no defense to this action



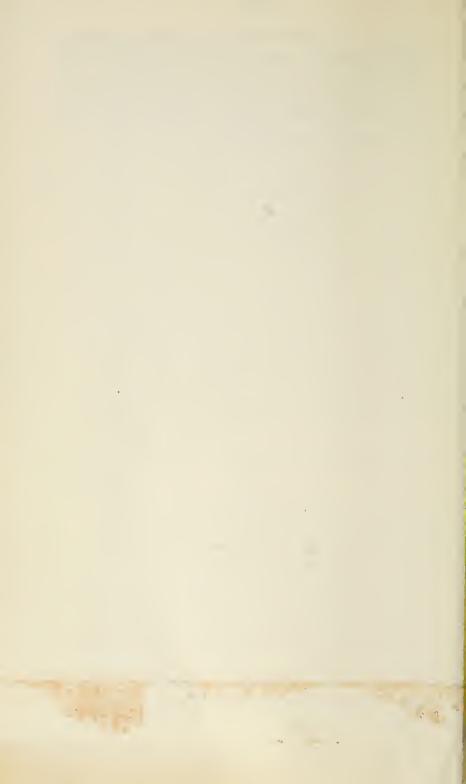
39	29	18	56	19	46	43	54	32	54	33	27	41	20	43	40
App., 1923) 1 S. W. 2d. 271	Armstrong Paint v. Nu Enamel Corp., (1933) 305 U.S. 315, 33 L.Ed. 195	Re Astor's Estate (1946) 62 N.Y.S. 2d. 117 at page 113	Black on Rescission and Cancellation (2nd Ed.) (1929) Vol. 3, Sec. 533, 534	Blackwell v. Bentsen (5 C1r., 1953) 203 F. 2d 590	Bogy v. United States (6 Ctr., 1933) 96 F. 2d. 734, 740	Borgla v. United States (9 Cir., 1935), 73 F. 2d. 550, 555	Boyce v. Odell Commission Co. (Cir. Ct. Ind. 1901) 107 Fed. 53	Brady v. United States (9 Cor., 1923) 26 F. 2d. 400, 402	Broard v. Lee (C1r. Ct., Calif., 1911) 192 Fed. 72	Byron v. United States (9 Cir., 1919) 259 Fed. 371	Birnbaum v. Newport Steel Corp. (2 Cir., 1952) 193 F. 2d. 461	Charles Hughes & Co. v. S.E.C., (2 Cir., 1943)	Coburn v. Warner (D. Ct., S.D.N.Y., 1953) 110 F. Supp. 350	Connolly v. @shwiller (7 Cir., 1947) 162 F. 2d. 423, 433	Cornwall v. Inderson, 35 Wn. 369, 143 Pac. 1

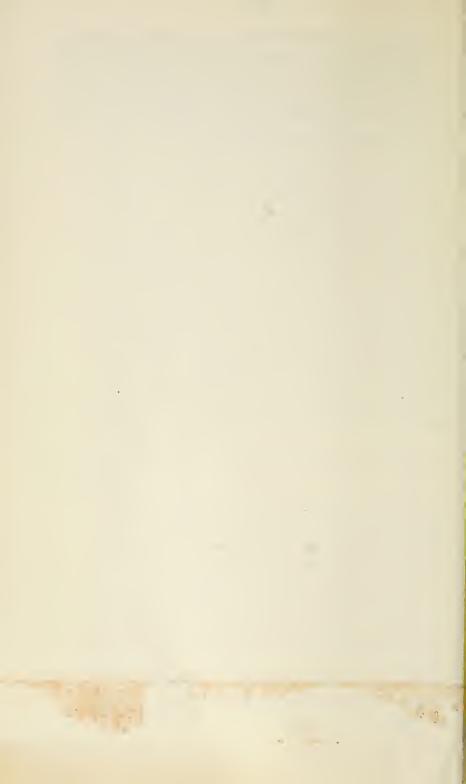


745	- 24	- 31	- 43	22	- 30	, 35	- 23	- 41	- 39	2,42	- 29	- 23	- 39	- 38	- 19	1
Dellefield v. Blockdel Realty Co. (2 Cir.	Doak v. Mammoth Copper Mining Co. (Cir. Ct., Callf., 1911) 192 Fed. 743	Durland v. United States (1896) 161 U.S. 305,	Equitable Life Ins. Co. v. Halsey, Stuart & Co., 312 U. S. 410, 663, 85 L. Ed. 920, 929	Fischman v. Raytheon Mfg. Co. (2 Cir., 1951)	Fitzhenry v. Erie R. Co. (D.C.N.Y., 1334) 7 F. Supp. 880	Fratt v. Robinson (9 Cir., 1953) 203 F. 2d 627 22,23,27,	Gelsmar v. Bond & Goodwin Inc. (D. Ct., N. Y., 1941) 40 F. Supp. 876	Hawkins v. Merrill, Lynch, Pierce, Fenner & Beane, 35 F. Supp. 104	Hickok Producing & Development Co. v. Texas	Holmes v. United States (8 Cir., 1943) 134 F. 2d. 12531, 32	Hurn Oursler (1933) 239 U.S. 238, 77 L. Ed.	Implied Liability Under the Securities Exchange Act, 61 Harv. L. R. 858	Johnson v. Chicago N. & St. P. Ry. Co. (D. Ct. Wash. 1915) 224 Fed. 196 at page 201	Johnston v. Spokane R. Co. (1919) 104 Wn. 562,	Joy v. Pagel (Mich., 1939) 283 N.W. 646, 121 A.L.R. 306	Tosenh v. Farnsworth Radio & Television Corp.,



23	32	23	30	41	23	48	56	35	83	39	43	18	48	747	43	33
Kardon v. National Gypsum Co. (E.D. Pa., 1946) 69 F. Supp. 51222,	Marshall V. United States (9 Clr., 1944) 146 F. 2d. 618	Mills v. Sarjem Corp. (D. Ct., June 29, 1955)	Musher v. Alba Trading Co. (2 Cir., 1942)	Norris & Hirschberg, Inc. v. S.E.C., (D.C. Cir., 1949) 177 F. 2d. 228	Northern Trust Co. v. Essaneu Theatre Corp., (D. Ct. III, 1952) 103 F. Supp. 954	Okeechobee County v. Nuveen (5 Cir., 1944)	0'Keefe v. Hill (3 Cir., 1939) 105 F. 2d. 325	Osborne v. Mallory (D. Ct., N.Y., 1949)	States (1824) 9 Wheat 733, 322, 6 L.Ed. 204	Overfield v. Pennroad Corp. (3 Cir. 1944)	Patti v. United States (9 Cir., 1927) 17 F.	Penn Co. for Insurance on Lives and Granting Annuities v. United States, (D. Ct. Pa. 1941) 39 F. Supp. 1019, 1021	Pinckston v. Brown, 56 N.C. (Jones Equity Vol.	Paddock v. Todd, 37 Wn. 2d. 711, 225 P. 2d. 76	Rea v. State of Missouri (1873) 34, U. S. 532, 21 L.Ed. 707 at page 710	Robinson v. Difford (D. Ct. Pa., 1950) 92 F. Supp. 145, 14923,



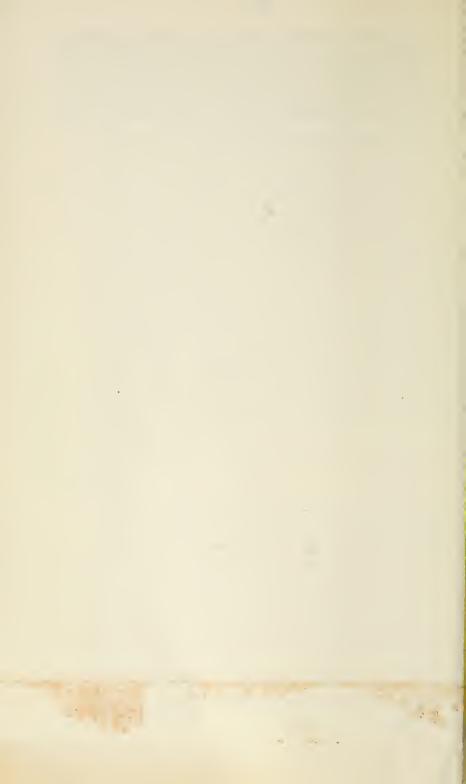


39	56	26	43		23	23		22	53	35	
Wax v. Cutting (1849) 20 N.H. 187	Weiskincher v. Volk (1905) 29 Pa. Super 611	Williston on Contracts (Rev. Ed. 1937) Vol. 5, Sec. 1525	Wynne v. Boone (D. C. Cir., 1950) 191 F. 2d. 220 at page 222	TEXTBOOKS	"The Prospects of Rule X-10B-5: An Emerging Remedy for Defrauded Investors", 59 Yale L. J. 1120	"Implied Liability Under the Securities Exchange Act", 61 Harv. L. R. 858	STATUTES	Securities Exchange Act of 1934, Sec. 10(b), Sec. 27, Sec. 29, Sec. 3(10), 15 U.S.C. #78j(b), #78cc(b) and #78c(10)17, 2	Ore. Compiled Laws, Annotated, Sec. 1-605(6)	Rem. Rev. Statutes, Wash. Sec. 159(4)	RULES

22

Rule X-10B-5, 17 C.F.R., Sec. 284, 10b-5-----

53



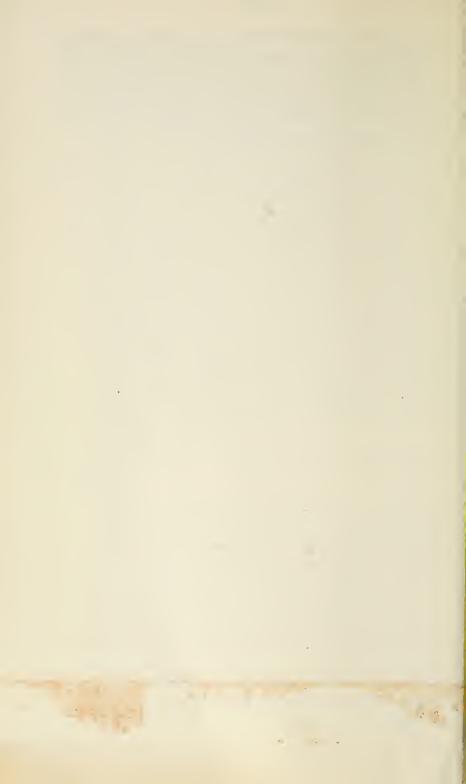
## BRIEF OF APPELLEE

for (hereto them ţ to nodn other property their "Statement the awarded almost worthless tideland appropriate Appellee the t0 scheme Court of called Mrs. Connell) is here defending sell events \$83,077.49 judgment which the Court below the (2) q to make her own "Statement of the Case". to perpetrate Vol Appellee believes it and her the facts upon which the chronological 140, Appellants devoted worth of securities induce (T. fraudulently 1955. conspired 125 acres of 17, to Ore,, January more Because than to that they had Appellee to \$124,180.09 to Bay, Case" deed her on gation after COOS Q

### CASE THE OF STATEMENT APPELLEE'S

(together Securi-Commission nodn conspired with each 733(b)) schеше the Appellants the Securities and Exchange 5 USC Sec. 10(b) of a fraudulent (T. 135, Vol. Sec. that 1934 (15 non-appealing defendants) found in violation of perpetration of 240.106-5). Act of Court Exchange trial Sec. of X-10B-5 the Connell The C. F. R. ļn and Mrs. ties Rule (17

that facts the of statement a concise scheme: the 13 Here constituted



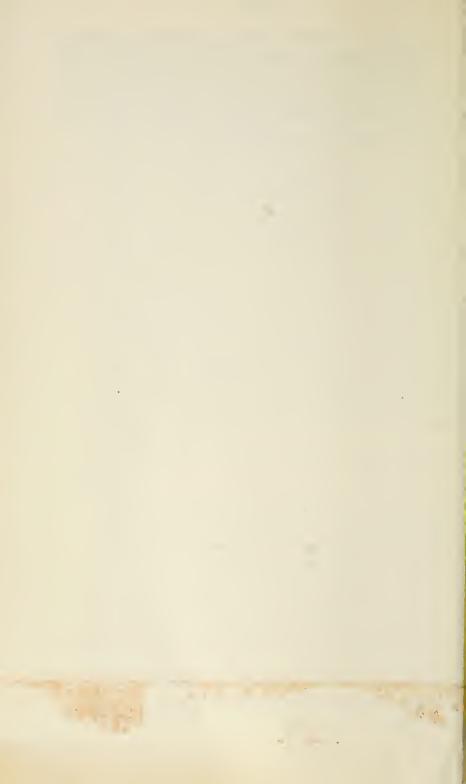
been a widow since 1946. eighty. She resides She is now the victim. 1949 she was 74 years of age. has Seattle, Washington and Was Connell Mrs.

Portland, old 50 years Salem, Errion year of T S a resident ţu ä a resident of Independence and/or (hereinafter called "Errion"), a little over Amy Errion, likewise 41 resides **四** Violet Kellerstrass , a conspirators include: R. Errion is Williamson × wife, unmarried sister of E. 5 Errion's Oregon resident. Oregon. Appellant and Portland, Oregon. Oregon. age Jo

Holdorf and his wife, Opal Holdorf, who spent consider-Washington, under the defendants organized from this judgment, namely: time in Oregon but were residents of Washington. Corporation, The other conspirators were State of Oyster have not appealed the Holdorf the of laws and the

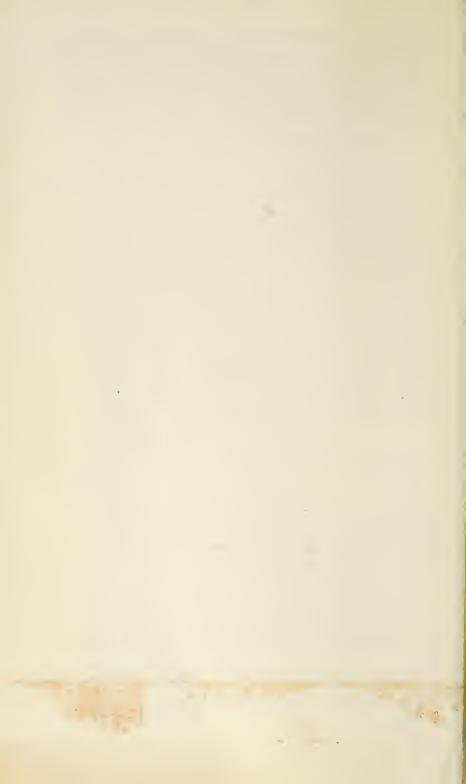
### Phase Inducement Its SCHEME H

the instance sell her 20 in Portfirst anxious At if he could help her Connell Davenport whom Mrs. Connell had met home at Seattle of which she was 1948. the early part of 1949 Mrs. Christmas holidays of her Seattle see Errion when he called at 40 106). called in the homes (T Errion during arge Ľ Mr. dispose. d land



presented Coos and other property valued at \$124,180.09 sale of in T represented home and tidelands a "plan" which later developed into a respect: Connell's acres of "plan" was in the following general at Mrs. Errion in exchange for 125 The so-called again called securities Bay, Ore. Connell Errion

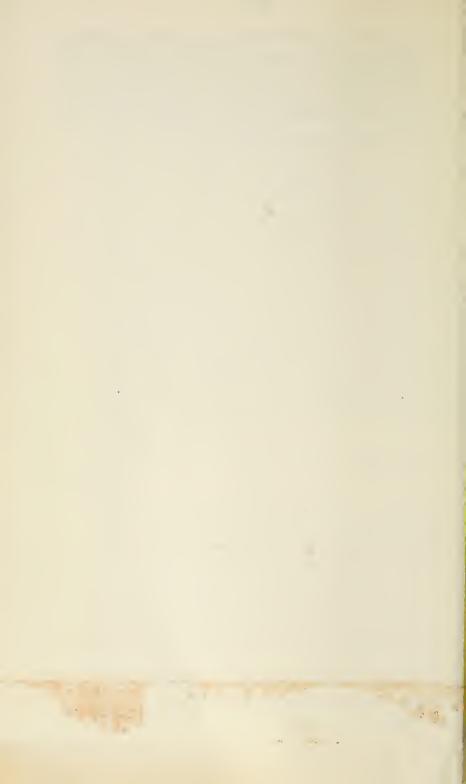
evidence estab-Bay would condemn his holdings of "Oyster" land and that it was necessary for him to 'establish values" true value \$1,200.00 per acre - representing \$150,000.00 pe but more her of Errion said he had large holdings of "Oyster" He said "establishment of values" land been so before land that its true value couldn't for a land securities and other properties "plan" the Fall of 1949 it was expected that the Errion was for Mrs. Connell to sell to him all of although the "Oyster" them and that they were worth \$2,000.00 some of it at its conservatively \$1,200.00 per acre. (T. 110) others there had 112). The in Coos Bay, Ore.; that he had held conclusive to commencement of condemnation. 40 condemnation action was commenced (T. other property for the some of it worth \$1,200.00 per acre, particularly necessary because such would be explained that the sold land by selling he in exchange for her established unless such and securities and of \$124,130.09 time at sales well further that in Coos said valued prior long Was



that the transaction would \$1,200.00 result, land at Mrs. Connell would benefit. (T. 112). establish the true value of the adjacent that as a "Oyster" Errion pointed out true value of the holdings of his own and the land

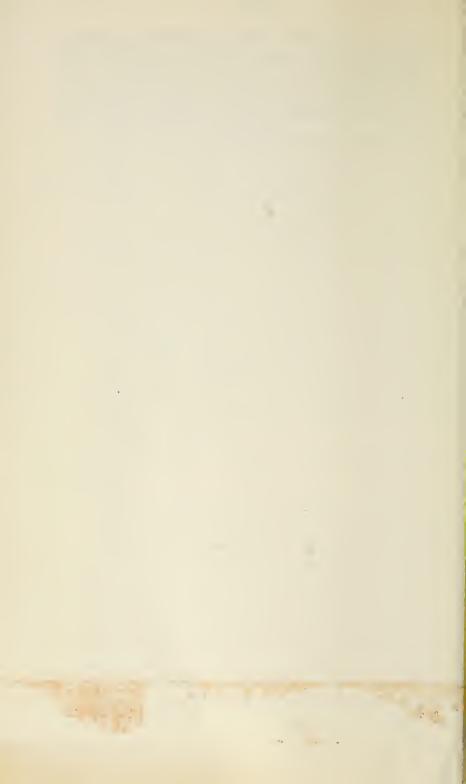
business \$1,200.00 condemning the land for Port expansion which land the Port consequence that within the year Mrs. much less the "Oyster" business - Errion represented When Mrs. Connell remonstrated about acquiring pe she purchased the "Oyster" land \$150,000.00 in cash that because the Port of Coos Bay would shortly purchase land or entering into any kind of a land for the value as established at sorely meeded, it would be required to didn't want, end up with did want. (T. 109). per acre with the Connell would, if any kind of

to state material 3 facts (T. 118, Vol. 2); made untrue under facts necessary in order to make the statements made promises as part intended untrue the circumstances (T. 121, representations as to the future as well as the fraudulent scheme, Errion made several presenting this so-called "plan" which at the time they were made were not (T. 120, Vol. 2); and omitted to they were made, not misleading. Connell, in the light of material ments of which



value of \$124,180.09 in exchange for a deed to 125 acres prom-Connell between August 22, 1949 and October 19, 1949 sold false following securities and other property, having a of tidelands in Coos Bay, Oreg. worth not more ises and misleading statements of fact, Mrs. Relying upon the misrepresentations, : (2) 110, Vol. \$12,500.00 (T.

- \$24,624.11 State Street Investment Co. Affiliated Funds poration The Borden Company Standard Oil of California General Motors Corporation Portland General Electric California Packing Convalue shares, shares, shares, shares, shares, shares, 54 195 652 50 (a)
- -122,61 sale cash Earned but unpaid dividends in on above securities at time of (a)
- The "Kalland" promissory note (maturity exceeding mine months) unpaid balance value (°)
- 25,000.00 Annuity insurance policy having face value of \$30,000.00 but an actual value at time of sale 25 (g
- 3,023.03 of in Seattle, Washington held Connell and having at time or unpaid amount and value of real is" contract, being sales contract of r "Bogardus" unpaid conditional property in by Mrs. Connesale an unpa (e)
- The "Rankin" contract, being a conditional sales contract upon real estate in Seattle, Washington held by Mrs. Connell and having an unpaid balance and value of



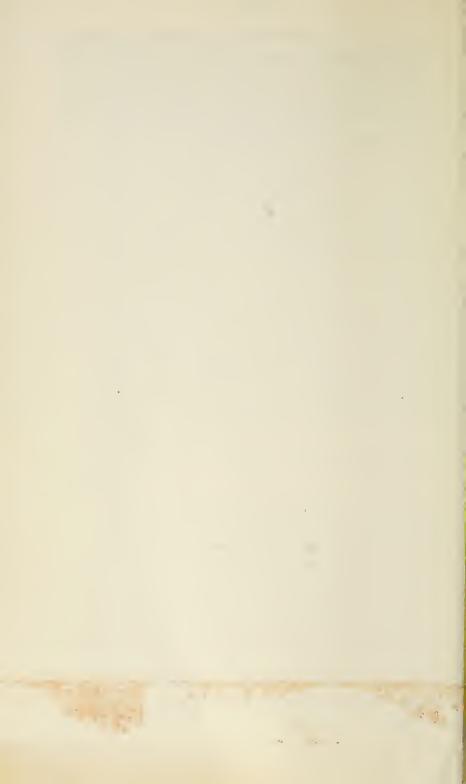
- 00.049 unpaid held real an in Seattle, Washington " contract, being sales contract on and having of value Connel1 The "Johnson" conditional se and Mrs. balance estate (B)
- 45,000.00 St. Washington, Mt. 2812 at Seattle, Mrs. Connell's home Helens Place, value (H)
- 16,893.78 property at h, Seattle, time having an existing unpaid balance of \$8,106.22 and an equity at time of sale of Avenue North, Seattle, a value of \$25,001.00 bid with a first mortgage residential incumbered Improved 811 14th of Wash. (1)

TOTAL \$124,130.09

other the following manner and Errion wherein 112, but with the partici she such transaction acre and Dwight Holdorf that of per securities 125 acres understood Corporation. \$1,200.00 transaction with Amy Errion, in selling her above described so effect to Errion in exchange for Errion times at consummated Oyster valued a11 of to assistance of flobleH single the direction Ore. Errion at. transaction was Connell Coos Bay, and ಯ nodn in Holdorf engaged she relied and under property r L Was 3 pation land Opal Vol. This and she

deeded her Wash Seattle, Connell ļn 42). Mrs. property (Ex. 1949 22, residential Holdorf August Opal no of and First, parcels Dwight two two 20

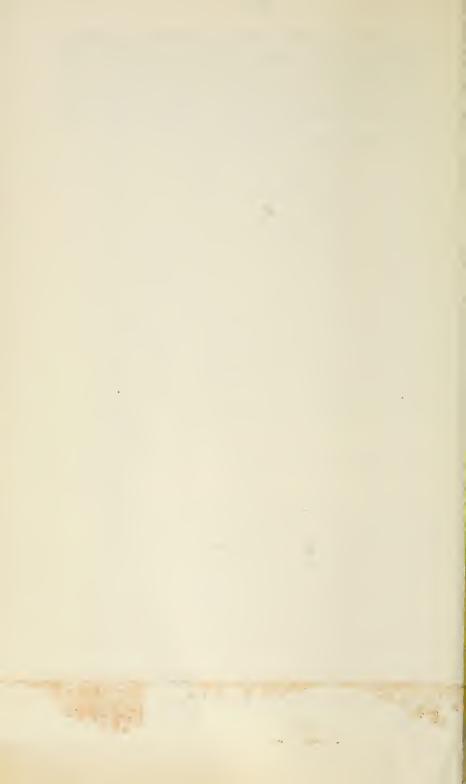
securities de-Connell corporate Mrs. 1949 listed 0 September above the Errion on Second, 40 livered



pro-On September 12, 1949 Errion gave to Mrs. Connell receipt subsethe shares of corporate stock, pending delivery \$24,624.1 at Merrill, the of Errion 65, ಡ giving ದ 97, Ex. her husband and keeping for herself treated as one year promissory note in amount of Errion with written consent such securities on her own account Seattle Wash., \$122.61 dividend check. (T. 94, which Mrs. Connell considered and land. the promised "Oyster" Fenner & Beane at Amy t t Lynch, Jo ceeds sold

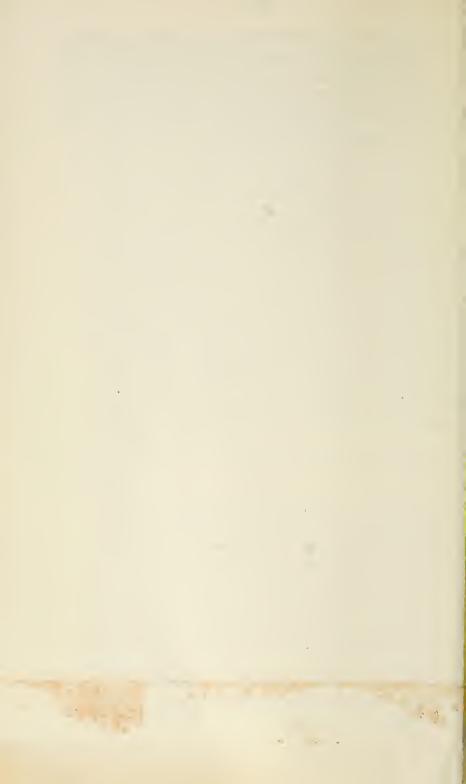
property A-5). 1949 transferred the "Kalland" note (maturity the annuity insurance policy; the Holdorf Oyster Corporation. (Ex. August 22, and October 19, upon real sales contracts exceeding nine months); between conditional 10 Third, Connell Seattle three

including receipt prepromissory note of Errion in amount of \$24,624.11 signed by the Holdorf Oyster Corporation and in consideration of a11 exat Holdorf transaction took place "Seattle, Washington" (Exh. A-5) receipting for document dated property, described corporate securities but 3 Ore. Dwight Vol. acres of land in Coos Bay, described securities and Seattle home (T. 114, on October 19, 1949 receipt September 12, 1949 for This ಡ Connell Connell. Connell's Fourth, to Mrs. the above document was the 125 Mrs. 40 cluding sented dated deed



(Ex. 1) **two** Oys-Corporation and Connell's Holdorf the on August 22, 1949 had named Dwight Holdorf ļn \$24,624.11, endorsed in blank by Mrs. Connell, Ore. time September 12, 1949 Connell (Mrs. Connell received a deed from Holdorf Oyster property naming the acres of "Oyster" land in Coos Bay, deeds to Mrs. this from Mrs. grantee in each. Also, at received second set of Errion dated grantees). parcels of residential the Holdorf Corporation Holdorf as of with a time Dwight issory note gether 125

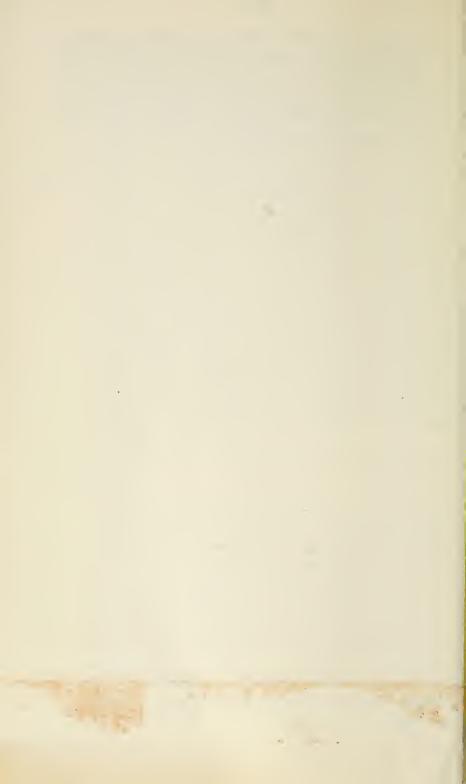
only the Amy \$124,130.09 worth of her by an atthe consideration of Dwight make was to transactions Errion, but also found that there was and six-week period by either Errion or Dwight transaction involving at various the scheme to defraud Mrs. Connell, made by Errion and Dwight Holdorf to Errion or Errion, Dwight Holdorf and Opal Holdorf each transaction and that its purpose \$12,500.00 worth of land in Coos Bay, Ore., The Court below not only found that paper as several Connell use of documents prepared by either and other property for a purchase from Mrs. Connell of presented to Mrs. single and indivisible 5 Vol. appear on Mrs. Connell 114, E) and knew of the transaction part of securities tempt was defraud over a



alter placed 1949 Errion organized OYSTER FRODUCERS the placed Errion Errion was owner of this corporation's stock though he all times a Washington corporation in which was stock in the name of nominal holders. Bay, Ore. trolled the corporation which was at Errion. (T. 115, Vol. 2). of tidelands in Coos Prior to of

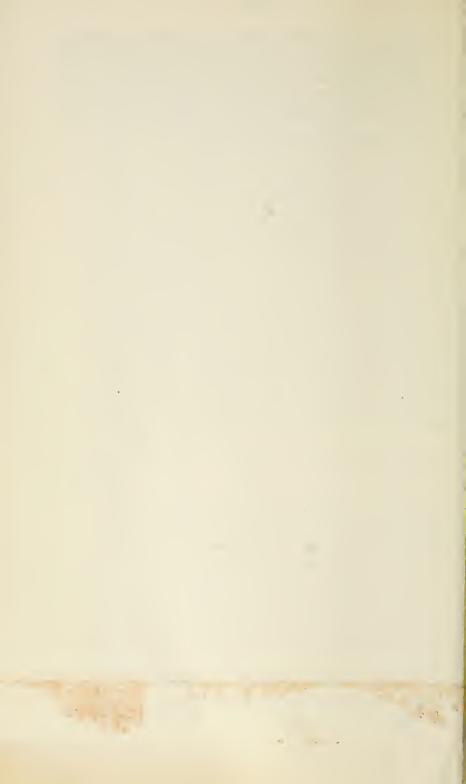
the latter Producers, secured by mortgage to said tidelands in the approximate Federal Documentary Stamps to the deed in amount purpose a bona fide \$400,000. substan-Munkers 500 Holdorf During June or July of 1949 Errion, Dwight Hol peen arranged for Oyster Producers, Inc. to deed the corporation a five year promissory cash or other valuable consideration passed. For of furnishing public evidence that the land had tidelands to Dwight and Opal Holdorf, Holdorf, together with one Glenn then holding Errion's stock in Oyster other sufficient to show the consideration as being for \$300.00 per acre Errion and Dwight trial Court found the transaction not to be \$300.00 per acre or \$400,000.60. or any \$300.00 per acre amount. (T. 116, Vol. 2). of land for and Opal amount of giving to acres of (who was affixed bought Inc.)

Oyster In early October of 1949, Errion, Dwight Holdorf the be organized caused to Holdorf



handed over to him as soon as the corporation conducted instead Dwight and Opal Holdorf was held by them for the express and Errion with t0 Of the stock in of knowledge that the corporate actions were part of contrary organized. (T. 676, 684, 793). Dwight Errion, who paid for such and had same endorsed by corporation acres Holdorf, as officers of the corporation, alter the as held a Washington corporation for to convey 125 defraud Mrs. Connell and that, the corporate affairs under direction of the Again, all to tidelands but and to enable the corporation was to Mrs. Connell. and Opal Holdorf Errion. (T. 115, Vol. 2). title of taking Holdorf appearance, the Corporation, and of Dwight t0 tidelands had been and Opal names of purpose scheme

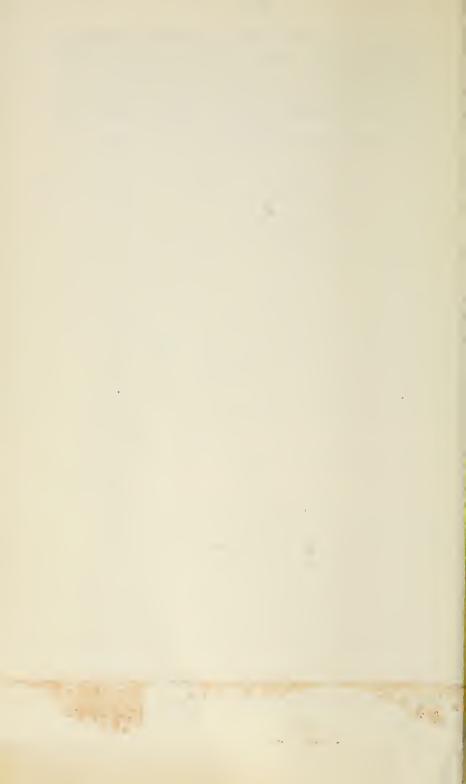
their tidelands Holdorf Oyster That as soon as Holdorf Oyster Corporation was Holdorf Errion and the Court found Oyster Docugiven by Stamps sufficient in amount to represent per organized in October of 1949, Dwight and Opal Again, affixed to the deed Federal of \$800.00 or other valuable consideration was and mortgage corporation in consideration of acres of the 500 acres of Inc. to the said tidelands. consideration of the tidelands Corporation assuming the note corporation for was for a Holdorf 469₹ Dwight Producers, conveyed cash that and



property tideland deeded as 19, 1949; she Errion land an \$124,180.09 of securities and other which Holdorf Oyster Corporation received, it 469½ acres of the but scheme to defraud Mrs. Connell. æ. value for sale 口。 Mrs. Connell 125 acres on October and/or fide From the false bona Oyster Corporation ಥ establish evidence of not т. 791-796). (Ex. A-5) Was transaction the exchange. giving her Holdorf ŝ of 9 40

792, 720-725). type of fraud as practiced on Mrs. Connel Opal CO of 500 and conveyed Skene, victims the acres of tidelands which Dwight reserved when conveying the rest of and representations. (T. to Holdorf Cyster Corporation, they Edith 24, 1949 to Graham and in point of time 30≥ identical The Holdorf August acres

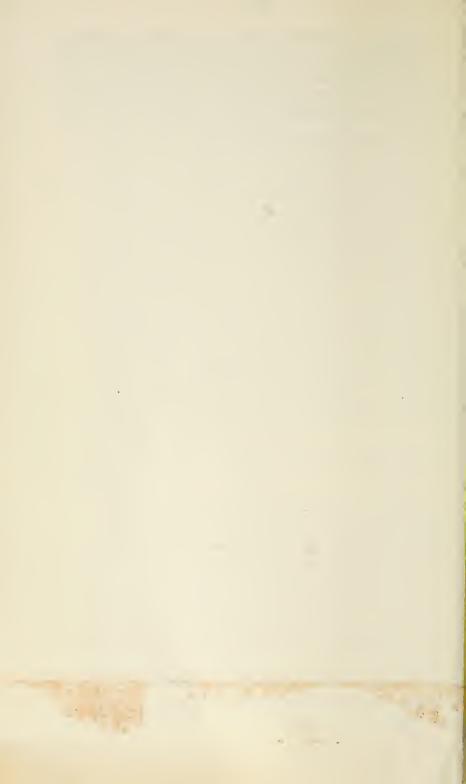
Joint the 585). all busy receiv and compan shared letters to Vancouver Portland bank wherein in Kellerstrass maintained a 565, old attorney an apartment the Errion apartment with a Both apartments 41 year . H) and writing was kept Q box in Jo to Errion. power Appellant Violet Kellerstrass, Errion lived in She deposit telephone calls and messages Errion (T. 572). ಡ (T. 519). money in the account belonged Errion in safe gave Violet CT! and unmarried sister of telephone she cpened adjoining connection. account with 470). Washington bank Errion (T. same 1949 Portland ionway the In



566). Was Violet Kellerstrass at the time well knew. (T. at Holdorf Violet Kellerstrass, to disguise the true ownership property transaction, the his to box (T. 576). After Mrs. Connell's real Errion in the name of conveyed Oyster Corporation in the principal WAS 811 14th Avenue, Seattle placed by which

the true recipients of the purchase money forthwith account of Dwight and Opal Holdorf in a Vancouver, deconceal \$11,400.00 in part to the joint account of In the early part of 1953, she ostensibly sold 20, \$11,400.00 to cashier checks at Seattle deliberately confusing series of transactions volving the further exchange of cashier checks she and Errion in a Portland bank and in part 15, 19, property for \$11,400.00 and for purpose of 14, 18, 13, 35, Wash. bank. (Study of Ex. reduced the posited the 22, 28) herself

checks the person who Seattle husband, in Mrs. Connell's home in connection secretary and 66), and then taking the principal during of Merrill, Lynch, Fenner & Beane; selling Errion was cashier the own account with written consent of her 40 Connell's home reducing to She was Mrs. Connell's corporate securities as wife of Errion's the transaction. (T. 161). and after the transaction; acted as Amy Errion present with Errion in Mrs. \$24,624.11 Appellant Errion (Ex. 65, typed documents Jo office ceeds



securities in amount of \$122.61 which she deposited appear in connection with received a further check from the brokerage firm for Her she activities Later own Salem, Ore. bank account (Ex. 67). to Errion. the "lulling" turned them over participation will facts in respect to Seattle, scheme.

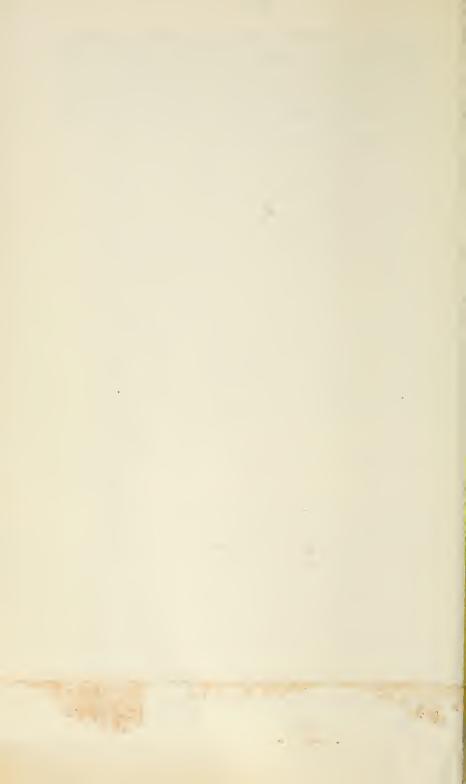
3 "lulling" Appellant the is best set forth in narrating The conspiratorial activities of scheme. the of Williamson activities

## -- Its "lulling" phase. SCHEME THE

not "lulling" activity in the scheme 20 particularly land and Connel advised Vol. 123, the part of Errion who persuaded Mrs. She was also inspect her newly acquired "Oyster" transaction with others; await developments. (T. Coos Bay, Ore. first The very from discuss her and to away lawyers t0

scheme Mt. Place, Seattle, rent free although the home Holdorf Oyster Corporation. (T. 2812 the activity of permit her to remain in her home at Another early "lulling" to conveyed 5) Helens Vol.

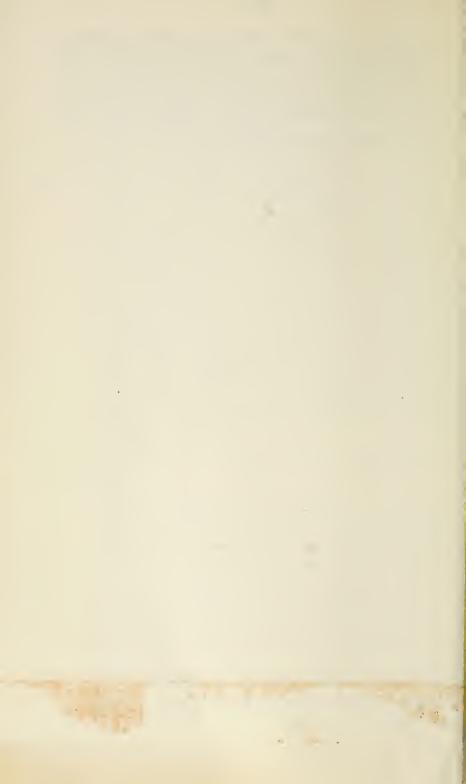
activity Errion arranged travel and to visit Connell further "lulling" Mrs. and Errion ď As Amy



concernthat this brip had as its purpose the hindering What nearly five Connell from discovering the true facts The 1950. and ended just before Christmas of 1950. commencing in July, extended to transaction. (T. 123, Vol. 2) short trip Southern California ಹ as intended of Mrs. found

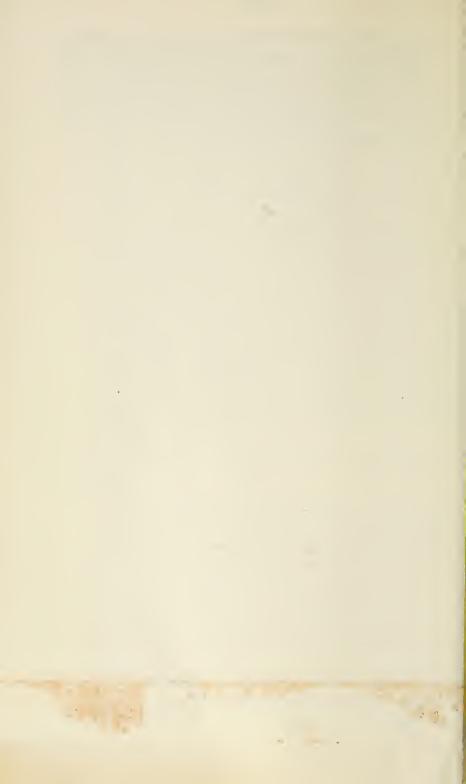
taking her further placate Mrs. Connell, the Holdorf Corporation advanced to her various amounts sale of her various contracts 1950 5 promissory notes in return. (T. 124, Vol. April, 1951 in total amount of \$4,230.95, money at various times between September, the from came 837). Oyster funds

With told Errion was from the East who was interested in undertaking activity Ore. been executed Errion and Amy Errion were still in Los Angeles. an with Bay, December 14, 1950 and presented to Mrs. Connell a man of in a Los Angeles motel, Errion arrived the 1950 while However, the most elaborate "lulling" and Errion first advising Mrs. Connell that 4). Coos signed arriving with "some fine news" (T. 118) EX. in "Indenture of Lease" which had already W. Williamson was cultivating oysters Connell Williamson in Oregon (T. 123, scheme came in December of if Mrs. that C. that business of represented Connell present Connell wealth



sum of money (T. 125). channel had same time he action that in the \$1,200.00 he would Willlamson Errion was quick to advise that the "Indenture of pay her could Connell wanted 93 over þe Mass 0 carefully of the action she 40 but that he would also her money while she was alive and not after she the "Oyster" land and cause for damages against the Port of Coos Bay which prosecute for her and see that she collected a Errion she Errion, Mrs. executed acres for meantime the Port of Coos Bay in dredging the land Mrs. Connell for the first time that security upon which × × a total of \$150,000.00. At the tideland but added Bay had withdrawn its condemnation Errion. Williamson with an option to purchase, C. good leased her 23 done and she read the "Indenture of Lease" year period purchase her 125 the land and that she had a When Mrs. Connell told a large by on the representations of represented thus any bank and borrow and one-third of the profits acres of executed was a have only cultivate Lease" otherwise 8 to be her 125 "Indenture of (S damages. per acre or i t not Vol. ĮĮ might 40 damaged not advised against Coos lieving 127,

N S Williamson while represented by Errion 4), .3 (Ex. 0 Lease" obligated The "Indenture of ಭ that document document ದ pe ಹ 40

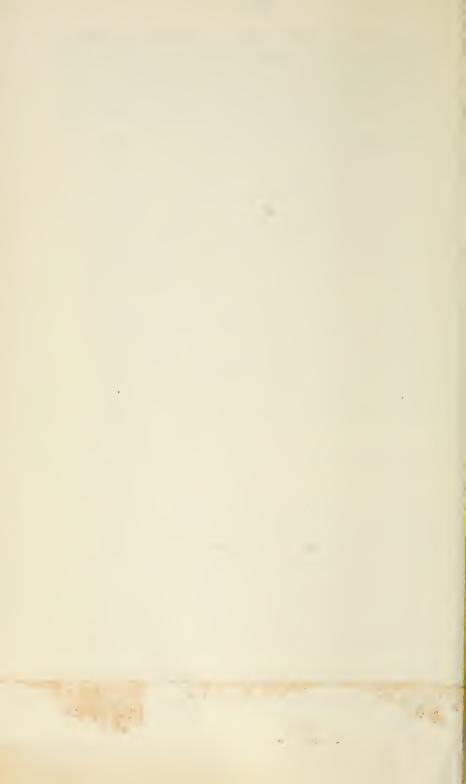


never This money was passed to C. W. Williamson used and Holdorf Oyster Corporation and National Forest 127, truth, personally acthe first half of 1953 by Dwight as a "front" for Errion and Dwight Holdorf to further of worth agreement semi-annual payments a total of \$22,500.00. (T. 126, by him to be W. Williamson was not a man of wealth; came from purchase such land; intention of cultivating the "Oyster" land; had paying to her thereafter in series Ę. the June Froducts, another Washington corporation which was W. Williamson defaulted in making payments In was also R. Errion. to to \$30,000,00\$ In security on which to borrow money. land and knowingly permitted himself He Williamson, part was retained ina the money was deposited Connell under the "Indenture of Lease" least \$1,700.00 (T. 133, Vol. 2). Connell. cordance with the "Indenture of Lease" It be but the alter ego of E. only per acre. forthwith sent to Mrs. Oregon; had no money to time period of \$1,200,00 "lull" Mrs. Connell by 1951, 1952 and Each time tideland at C. W. 133, Vol. 2). ಹ Vol. 2). Holdorf, purchase seen the found to Jo the rest 0 at during count kept less

worth

over a

Another contemporaneously conducted "lulling" taking 1951 thereafter Wrs. Connell her home; scheme transpired in July of and mortgage which he back to activity in the \$16,000.00 note deeded Errion



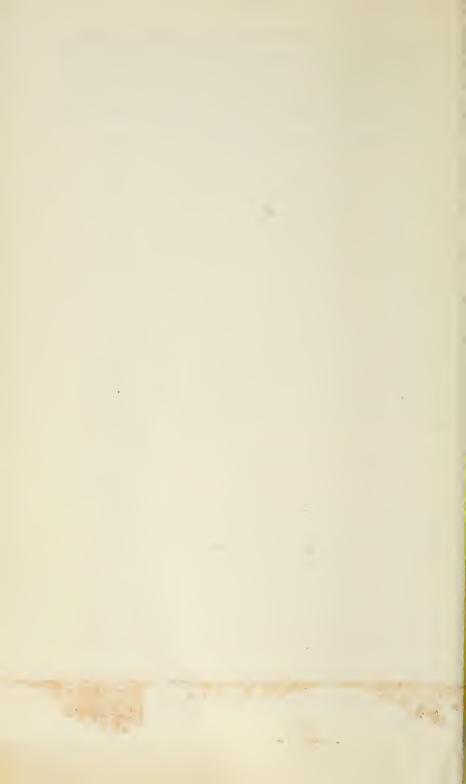
Details 8 (T. 127, Vol. cash. to Glaser for \$16,000.00 24 in Finding No. forth hypothecated set

Interstate of Instrumentalitles oto Use i Commerce SCHEME

10(b) of the Securities and Exchange Appellants (n and the the Commission. (T. 134, Vol. facilities of a national securities exchange (T. 960) States of inter (29 Connell, and indirectly the United commerce (T. 960, 122, 174, Ex. 15, 79), instrumentalities the scheme to defraud Mrs. X-10B-5 of in violation of Sec. directly (Ex. 33, 54, Rule both and mails state used Act

A substantial amount and number of securities were involved in the single indivisible transaction.

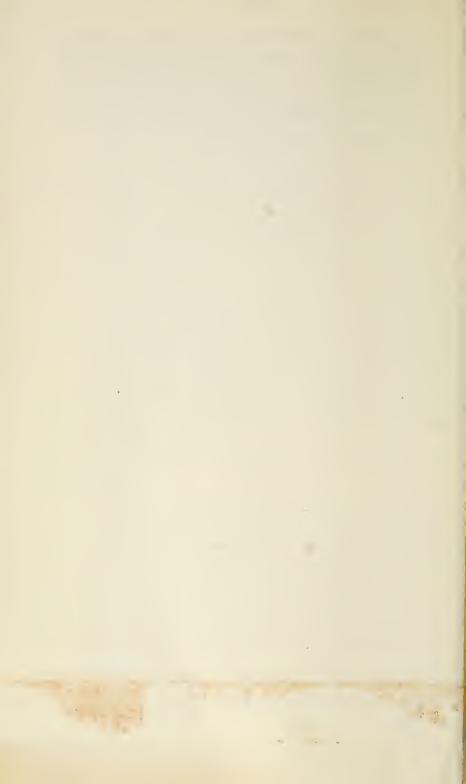
securi-Such unquestioned nouthere having satisfy another involved shares and important and fraudulently taken from Mrs. Connell, Mrs and These were unquestioned to securities non-securities by question corporate nine months substance sufficient promissory note held substantial Sec. 78c(10)). aiso without the \$124,180.09 worth of \$24,624.11 worth of transaction in should be with maturity exceeding ಭ much ಥ seven different firms. 8 Mass and represented (15 U.S.C. The "Kalland" bit transaction the \$915.80 every that were included securities securities Jo securities Court Connell value the ties.



in value \$11,623.79 X E three conditional sales contracts - "Bogardas", \$25,000.00 in value Only if there is a question about this view do the question and contend that aggregating taken from Mrs. Connell of another 1 "Rankin" and "Johnson" also securities. Federal the

Act of "securities" includes any instrument "commonly known as a security" 1934 Securi Court should also appreciate that although the Act of 1933 (15 U.S.C. 77c(8)) exempts 3(10) of the Securities and Exchange "annuity contracts" from its operation the 1934 (15 U.S.C. Sec. 78c(10)) in defining and Exchange Act does not. Sec. Securities

indebtits literal meanthe -qo Granting C.I.R. (6 Cir., 1945) 62 The term "security" under present 1939) 106 F.2d. 232, 237. S.E.C. v. Bailey of Ass'n "security" has been defined as a written It was (1946)ance for return or payment of money; evidence of The Court is required to look substance; not form and to adopt a broad concept United States, (D. Ct., Pa., 1941) Service Penn Co. for Insurance on Lives and Ct., Fla., 1941) 41 F. Supp. 647, 650. Astor's Estate generous scope far beyond S.E.C. v. Universal Trenton Cotton Oil Co. v. by the court in In Re 1021. 33, 37. term "security". Annuities v. has a Supp. 1019, 147 F.2d. (7 cir., edness. served usage

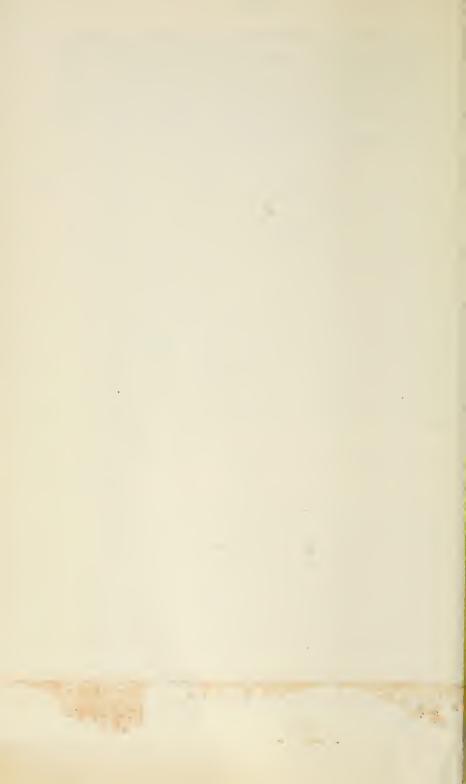


Court having and shares 125 second the District A-3) second corporate Errion's the (Ex. 8 and 77c( nine months in note the of shares of Sec. return jurisdiction Errion's as corporate security 0 for U.S. of land 15 defeated. excess ಥ the the much first. "Oyster" for property, 1n ಇಣ pe the exchange Was maturity not of th action other could were

5 rties by reason Securities and X-10B had jurisdiction parties by reaso Rule and e cause and par 10(b) of the 3 e Act of 1934 a Court Commission. District over the Exchange Sec. the of

her parties the not 42 4 that feels have Court's jurisdiction and Court cause Appellants Appellee this the Show below, Of that jurisdiction succinctly trial fact Court the the the and had Jo attacked in. spite clearly or Court here In seriously District 40 either

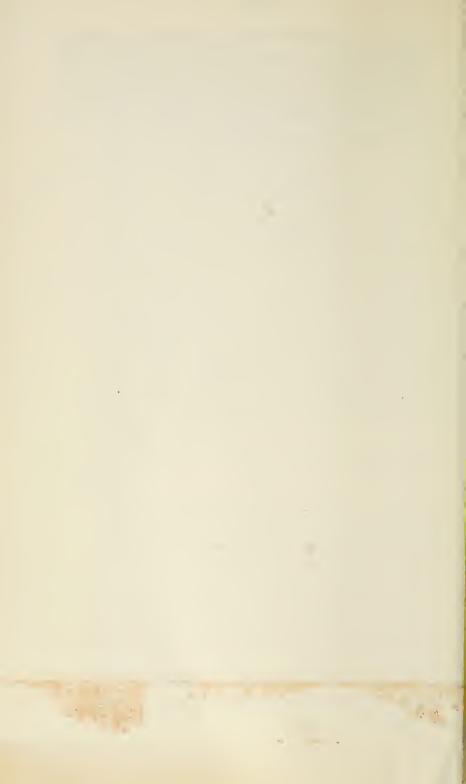
"exclusive" causes the author1 ty 27 expressly bu to equity Sec Ct Mrs. boundaries grants civi that 9 statutory the Ų, 13 ļn tha, over Warner out expressly OL Court However, other law **Jurisdiction** territorial point with District > any at Coburn 78aa) 850. had should together 10 have remedy its the .Supp. Sec. "exclusive" E O . States otherwise beyond Act, preliminary, Eq • -O granted tiona 10 U.S. the  $\vec{\mathsf{H}}$ United process addit 1953) (15 Court ght under sdiction Act the min In District serve sing × 23 Н Connel the withi juri mad ari to



remedy and come into the District Court causes for fraudulent to secure relief for fraud in the "exclusive" jurisdiction purchase of securities but merely declared that Mrs. purchase of her securities in violation of the could by choice or necessity forego a other words, pre-empt the field as to giving the District Court #78bb). (15 U.S.C. (but no where else) law or equitable Connell

induce her to sell to Appellants in a single indivisible She alleged and proved misrepresentations, frauduonly estab a scheme and device to fraudulently violation other below and proved that Appellants had conspired into the of Act and property for almost worthless tidelands in Coos fact that not a direct Exchange Mrs. Connell in the case at bar came transaction \$124,180.09 worth of securities Sec. 10(b) of the Securities and law fraud but as well .C. Sec. 78j) which reads: omissions of the perpetration of and promises 11shed common lent (15

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of any national the mails, or of any facility of securities exchange... exchange... "(b) To use or employ, in connection with purchase or sale of any security registered anational securities exchange or any security so registered, any manipulative or deceptive the Commission may prein the public in contravention of such regulations as the Commis necessary or appropriate contrivance device or rules and ಇ cribe the



Securities investors. Stat. 891. the implementing Rule X-10B-5 of the of 48 for the protection , c. 404, Sec. 10, interest or for t June 6, 1934, c.

10b-5) which 240, Commission (17 C.F.R. Sec. Exchange

directly or indirectly, by the use of any means or instrumentality of interstate commerce, or the mails, or of any facility of any national securities exchange,

scheme, any device, To employ defraud, "(a) e to

fact made, circumstances under which omit to state a material necessary in order to make the statements in the light of the circumstances under wh statement they were made, not misleading, or any untrue "(b) To make material fact or to

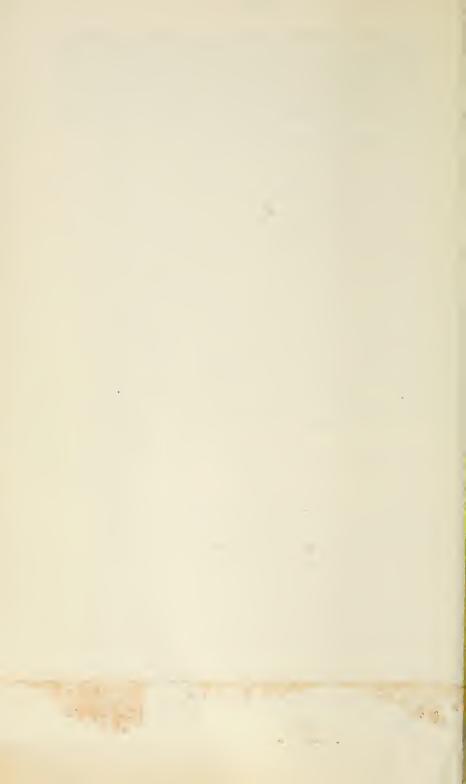
oper-Or connection with the purchase or sale of any practice, or would any act, operates "(c) To engage in course of business which

such scheme involves other Circuits have well established that persons 10(b) of the securities this Court and cause of action for fraud. So far as Appellants' fraudulent implication from Sec. set forth. as above or sale of have a Rule X-10B-5 Mrs. Connell cause arises by purchase and ಭ

(3 cir., 1949) F.2d. 203 Fire Ins. Co. cir., 1953) Robinson (9 Slavin v. Germantown 174 F.2d. 799 Fratt v.

(2 Cir., Co. Mfg. v. Raytheon F.2d. 783 Fischman 188

Pa., (E.D. al Gypsum Co. v. National Kardon v



Del, Ct., 9 Corp. Transamerica Supp. 457

饵 92 1950) Pa., Θ. . ы Robinson v. Difford 145, 149 S.D.N.Y. Ct. ė 1955, (Mar. 31, 417, 419 Thiele v. Shields 131 F. Supp.

1955) 29, June Sarjem Corp.(D. Ct., F. Supp. 753 Supp. M111s

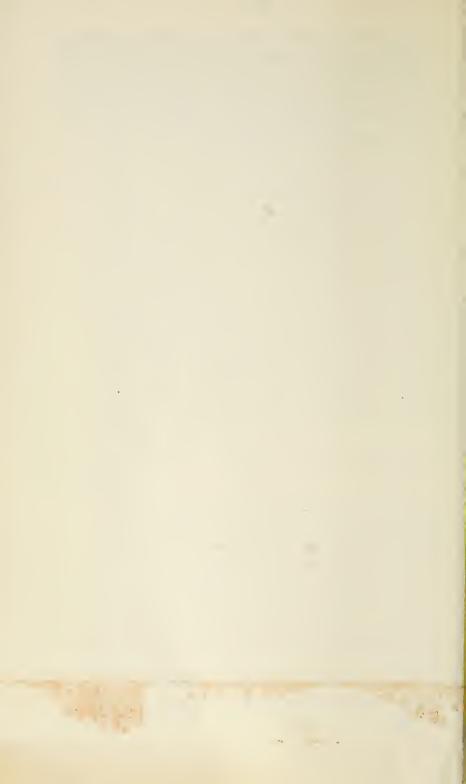
Rule X-10B-5: An Emerging frauded Investors", 59 Yale for Defrauded Prospects of Remedy L. J. 1 "The

Exchange "Implied Liability Under the Securities Act", 61 Harv. L. R. 858. judgment declaring void (15 U.S notes and other instruments in the fraudulent scheme, jurisdiction of 29(b) of the Act that portion of the District Court rests upon Sec. series of cancelling a 78cc(b)) to AS involved

1946) Pa., (E.D. 00 National Gypsum Supp. 512 Kardon v. N Ct., Inc. Bond & Goodwin, 40 F. Supp. 876 Geismar v. 1941)

Supp. Co. v. Essaneu Theatre III, 1952) 103 F. Supp. Northern Trust

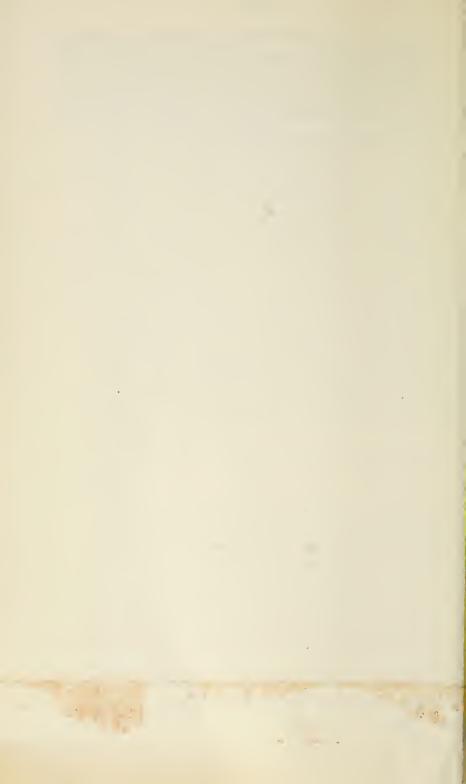
the be kept is that in Mrs. Connell' trans and far as it must and at bar 627 scheme distinction so at bar Appellants, in purchasing Here diction is concerned between the case (9 cir., 1953) 203 F.2d. single non-securities. same possible in the only action acquired also Robinson, The securities



does and several, such taken single resultant property the acts constituting the perhaps different although the make several 1s Connell mind that

Ind. For example, where smelter fumes damaged valuable a plaintiff lost money gambling on 47 different single tort was involved Mammoth causes property the Court ruled that no matter how numerous attachfrom one wrong Commission Co. (Cir. Ct., occasions in a "bucket shop" the Court permitted the Fed. Fed. 72. non-contiguous parcels of located of action. pleading of a single scheme and not 47 different action. Doak v. Mining Co. (Cir. Ct., Calif., 1911) 192 Likewise, where a wrongful 192 made upon various and separately items of damage if they all flowed but one cause Calif., .1911) and likewise a single cause of the same owner, a Odell subject of (cir. ct., upon two Boyce v. 107 Fed. 58. located Lee the belonging to action. they were Breard v. Was Or where

securities have hownon-securities in a single indivisible transaction Appellants involved believe, substantial in value and number. sell both same opinion as jurisdiction; particularly where the the ĕe that brief. fraudulently induced Mrs. Connell to the fact discussion. point in their are of the not believe JO Appellants worthy raised this securities were go j.s 1. t effects



transmaking unlawful fraudu-Were inducements sought \$124,180.09 worth of securities and non-securities. The 40 single purposes as well as its "lulling" activities single tort was a fraud which violated both as much to acquiring the securities as Appellants in scheme so far as the securities are concerned. primary relief tort cannot be dissected. In this the entire scheme; its fraudulent Rule through a law as well as the Act and single wrong of the Connell bar at Mrs. case damages for the inducing the In directed commos single action fraud

those who Sec. 10(b) broad Rule Xin re-Act and Rule were directed broadly to securities and nonthe through single indivisible transaction. 10B-5 had in mind and intended to outlaw fraud sales or exchanges of securities. Act and the Commission in promulgating nothing else, it did not contemplate that evade that Congress in enacting simple expedient of comingling securities Act and Rule dealt fraudulently in securities could and purpose of the believe g securities in all ĭ, spect to language and the

much to the securities as to the non-securities,

ສຸ

tained

the return to Mrs. Connell of \$26,730.95 per-

The "lulling" activities which in

non-securities.

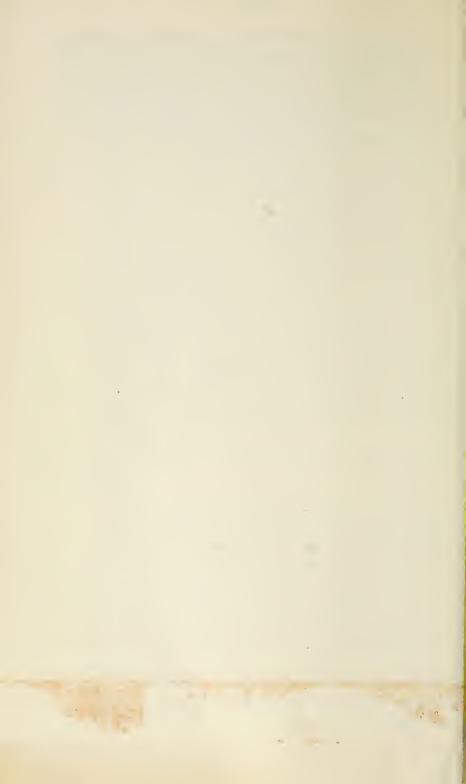
involved

part

the

40

grant impossi 40 bar, it is ದ್ದ 30 segregated, apparent in the case at transaction to be i S the S



the single trans unlawful sell activities were frauduthe entire scheme; its fraudulent inducements case at bar the primary relief sought tort was a fraud which violated both the \$124,180.09 worth of securities and non-securities as much to acquiring the securities as making far as the securities are concerned. of Appellants in scheme tort cannot be dissected. In this through a law as well as the Act and Rule purposes as well as its "lulling" inducing Mrs. Connell damages for the single wrong In the single 000 directed common single

that those who that Congress in enacting Sec. 10(b) the broad While Rule Xhad in mind and intended to outlaw fraud in reand Rule were directed broadly to securities and nonand purpose of the Act and Rule through single indivisible transaction. securities. Act and the Commission in promulgating evade simple expedient of comingling securities nothing else, it did not contemplate fraudulently in securities could exchanges of to all sales or believe securities in a e K language Act 10B-5

much to the securities as to the non-securities.

as

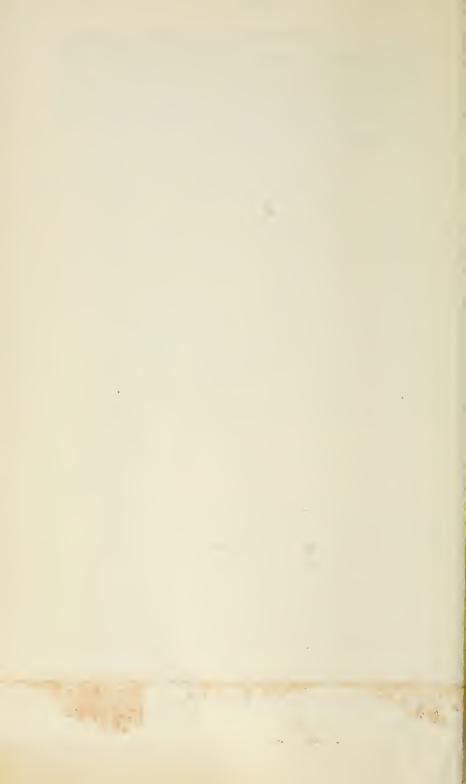
involved

the return to Mrs. Connell of \$26,730.95 per-

non-securities. The "lulling" activities which in

part

grant impossi to bar, it is 83 000 for the transaction to be segregated, As is apparent in the case at



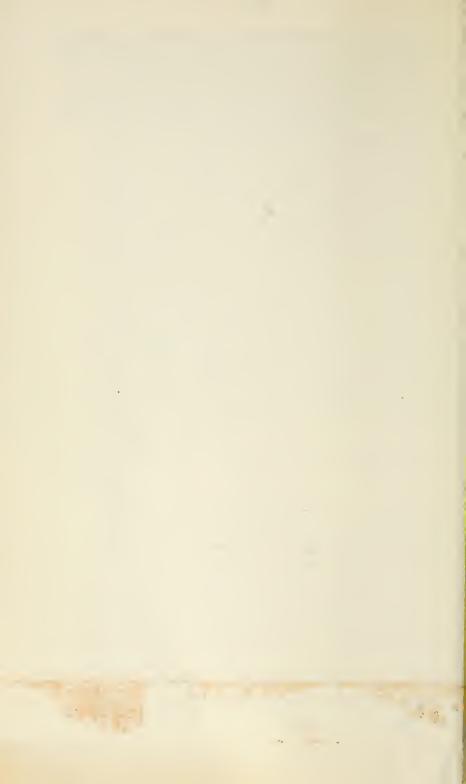
securities crystal -un Volk one (Rev. Without Court with its not under jurisdiction over securities would have > that become Appellants Contracts Rescission "piece-meal" Weiskircher pleaded the granted axiomatic securities Sec. nothing. would sale of on Connell 3 rescission had been on have elected had the The District This 325; Williston pe ₩ (3) Black the (2nd. ed.) (1929) Vol the transaction or transaction cannot Ιt 2d. as Mrs. grant rescission of 1525; non-securities the non-securities. respect 611; 江 105 Act, Sec. "100t" Super. 1939) ı, complete entire the 5 could the Vol. the of Cir., Pa. ಹ Cancellation the 29(b) dissipated questioned of and **t**0 **20** 29 1937) ĮĮ adequate and not cission unable either (1905)Sec. H111 Ed.

t0

relief

supported Securi said amicus jurisdictional Commission the brief Commission Court by the appeared trial the The brief invitation of the On . dismiss Commission 1 ts Connell of 10 11 Mrs. sur motions page Exchange position of the Ou At question. and curiae

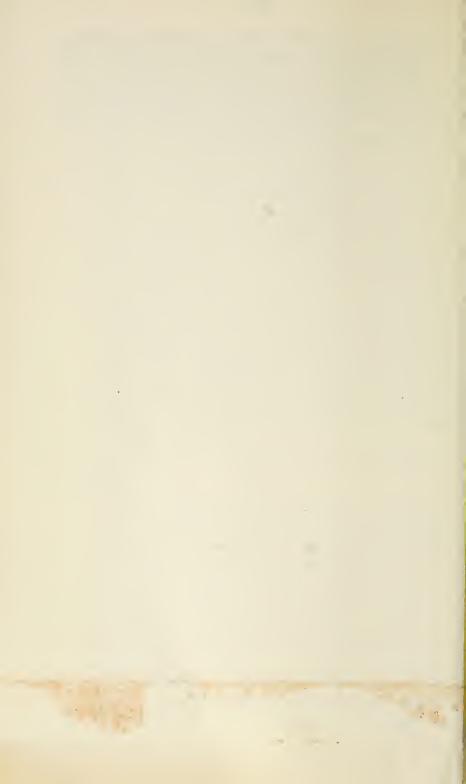
for frustrat. such a combination purchase; prior court ruling. The lowever, are literally applicatous that a contrary holding defendants we know non-securities does not render far as we kn Rule X-10B-5 Were 100 that by this purchase rule, however, are lited is obvious that a contina rather simple method he legislation. securities able acquired non-securities do X-10B-5 inapplicable. So is the first action under ing the purpose of the fraudulent buyer of sec is no has involved fact so there and it and afford "The statute which able; would Rule this and



the recovery mining that the instant complaint does allege a violation of Section 10(b) and Rule X-10B-5 thereunder. Section 27 gives the Court exclusive jurisdiction to determine the recover at the easily be rendered meaningless. The Court, could burunder merely by the rule entitled X-10B-5 mer is evident that pe non-security to which plaintiff may Rule under it chasing a no liability statute.

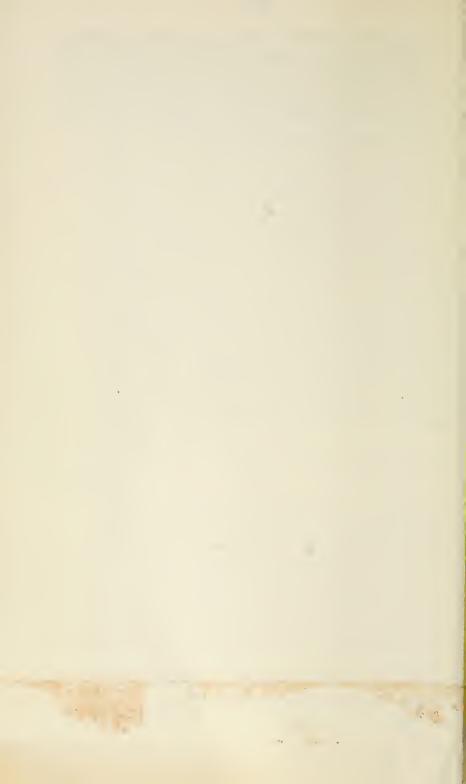
lack Television narrow Steel of the situation the of t0 to 20 denled 701; The Newport contrary Was give Sugarman Nor, 10(b) page જ brief Supp. Radio a supra. 20 cert. Sec. and purchaser; at Birnbaum v. bar. Act, urging this Court Judge Appellants Appellants Farnsworth 99 F. 461, ( Robinson, of at of the the case scope prompted 1951) F.2d. L.Ed. 1356 ü the 10(p) ۰ seller the other hand, > Fratt v. "insiders" 193 S.D.N.Y., in quoted decision which nbou loseph j. in 1952) Sec. not exist between contend, 883, 96 in හ හ t0 ct., limited to Cir., 926, prior holding himself F.2d. construction rely does privity Appellants <u>е</u> 8 S that in 198 press which Corp. Corp. in

cause respecting the non-securities jurisdiction of the is adequate to give Appellee's cause the single are comingled with ties in this single determine fraud. single "pendent" Federal Court 100 securities power the which for Court the forms Federal that the question that settled federal peen a With long presented has when



jurisdiction President fact or jurisdiction of 738, Osborne v. and may exercise its "pendent" determine other non-federal questions of Wheat σ States (1824) ingredient of an original cause has are inextractably involved. Bank of United case 204. L.d. the 9

and law Mrs. copyright the both arising out of The case at bar, seeking damages arising out of Federal the common the Federal Court juriscopyright Court common jurisdiction over the fraud that caused give single action for copyright in Just as diction determines simultaneously the non-federal the non-federal the the Federal the the diction over unfair competition, so should it with and in exercise of its "pendent" involving Federal the same acts which violate There, law involving the unfair competition. precisely similar to 40 along as of right, the cause as situation of a plaintiff coming into a concerning unfair competition. lose her non-securities and unfair competition, There, the single fraudulent scheme and as well as jurisdiction gives set of facts. securities seeking damages in a non-securities is is violated by takes, infringement Court below 40 securities fringement "pendent" subject of

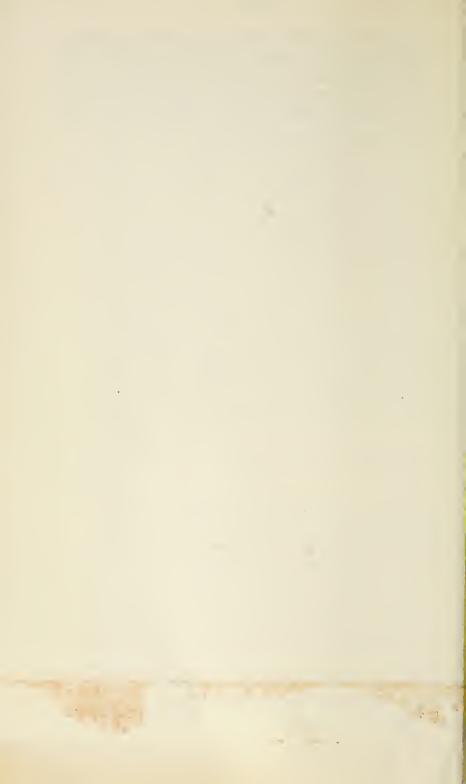


(1938)Enamel Corp. Nu 83 Armstrong Paint v. 305 U.S. 315,

L.Ed. 77 238, 289 U.S. (1933)Oursler

in whether an order of a state railroad commission violated 175, 53 L.Ed. 753 where the Supreme Court held the Federal Constitution, and having taken jurisdiction Leading prolific determine that federal question (in a non diversity Co. (1909) alone Federal Court had jurisdiction to determine state jurisdiction in this field, such decisions seem to appear. not ass & N. R. the lawfulness of the order under trademark cases, jurisdiction is Siler v. Louisville had "pendent" and "pendent" copyright here) it However, other fields is ಇಜ 40 such determine law, 213 U.S. confined that a local 100

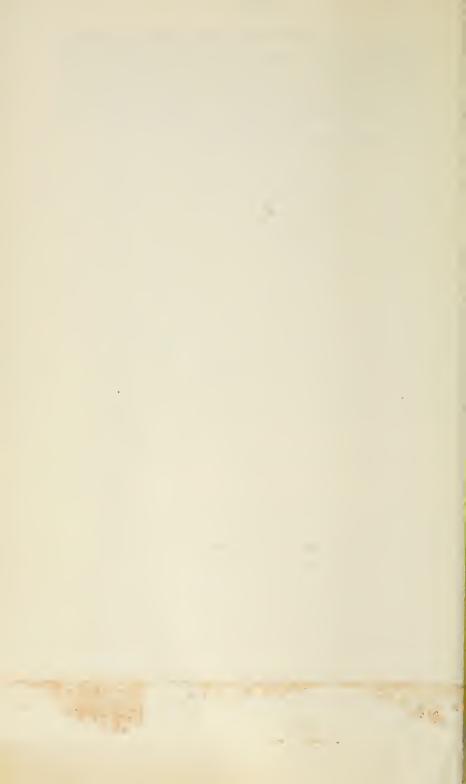
of the preand 648 recognized District Court in an action for Act securities violated Connell's annuity as here Exchange United question as the only the > are contract terminated question and . Southside Theatre F.2d. contracts the Securities the non-federal determine not 178 particular Even the Mrs. the parties had (9 cir., 1949) to whether or not sales terms. d Q relief to of conditional in but also jurisdiction of whether the meaning This Court its of Theatre declaratory Act one 40 question of as three pursuant Sherman whether within sented



F.2d. and non-federal 1934) 72 the question justifying jurisdiction to determine Cir., controversy -- federal 9 Van Hooser federal > of "pendent" substantial G0. remainder of the Pacific B exercise Southern 15 903

becomes particularly 1934) Courts have taken the view that the exercise perjuris, involving within the District Court's sound discretion. exercise of "pendent" jurisdiction court's Such discretion should humanly Connell of her entire wealth 12 "pendent" jurisdiction is not mandatory but only (D.C.N.Y., Alba practicality of exercising "pendent" Cir., 1949) 177 F.2d. 427, and page trial 20 dissenting opinion in Musher v. entire, non-severable controversy its discretion in taking hold of As Judge Clark 9 at Erie R. Co. for this Court to affirm the case be discretionary, it (2 Cir., 1942) 127 F.2d. and non-securities. on appeal. Fitzhenry v. defraud Mrs. Palmer (1 ΙĮ 880. be disturbed 687; in his the > 40 in a proper appropriate C0. of ciding this 2d. securities 7 F. Supp. Strachman expressed missible exercise scheme diction of

be reserved exclusively anomalous to send o the State Court to the Federal bench, it is y across the street t roast must the gravy across House." the JI. for the

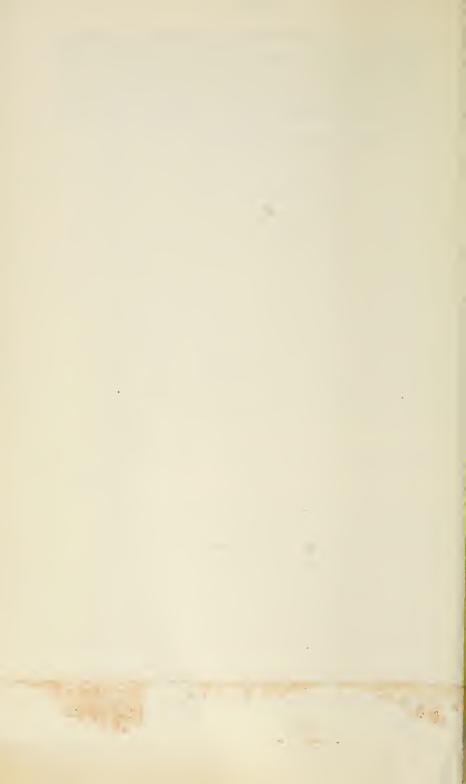


Cir., States, (9 said in Marshall v. United 618: .2d. Œ

available or fraudulent insituation in question. <u>clark</u> (9 cir., 1942) 132 F. 2d. 538, nited States, (10 cir., 1941) the offense, ctrcum-132 F. 2d (10 Cir., rarely facts and of evidence is Cir., 1942) ted States, fraudulent scheme very nature tent. From the ver, must be inferred from the Gates v. United ... 2d. 571, 575." ... Direct United States, 541; Gates v. U. 122 F.2d. 571. the of prove stances

of continued to "lull" the victim into a sense of security (9 Cir., Use the scheme is often "lulling" activities is sufficient States delay detection of the fraud. scheme to defraud necessarily v. United States, United Brady v. with the obtaining of a profit as 400, 402. Marshall 617, 021; Cir., 1928) 26 F.2d. does a inaction and to mails to carry out for jurisdiction. 1944) 146 F. 2d. 6

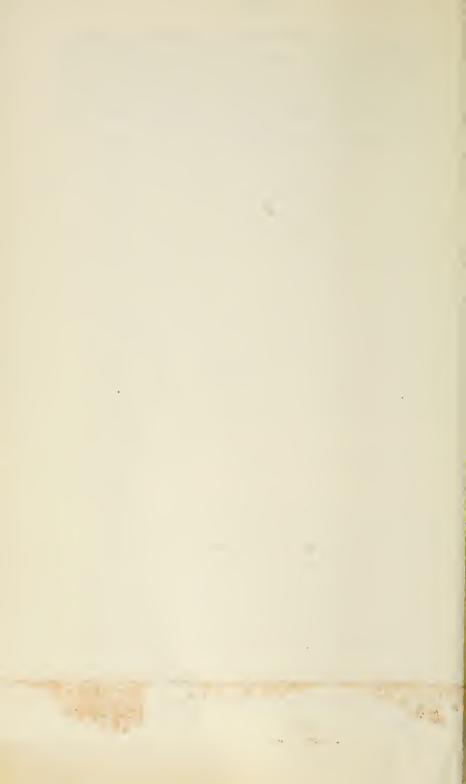
F.2d. "puffing" and constitutes Gross exaggeration of opinion respect-United ab Promises made and representations as to future to and 1948) scheme be furthered by fraudulent how many 1943) Even though a business be lawful in form (9 ctr., Byron V. Grayson (2 Cir., ದ (8 cir., are competent evidence in proving States astonishing in the world" States United land exceeds S States v. are United Stephens v. "It investors there such cannot 445. > the value of United 866. Holmes 440, sentations. 863, pearance F.2d. defraud. fraud. F.2d. lous



scheme would not deceive one of ordinary intelligence that The fact Tucker v. 224 Fed. 833, 837. 259 Fed. 371. not relieve the wrongdoers. States (6 Cir., 1915) 1919) (9 cir.,

transacts 145. Vancouver, Washington) Sec. 27 of Act (15 U.S.C. #78aa); "Statement of Neither logic nor the authorities support a proposition entirely within the confines of the Western District of JO that the entire scheme must be proven to have occurred 1n important Appellants which occurred in the Western District 1950) 92 F. Supp. Western District of Washington (1.e. Seattle or Jurisdiction is satisfied if any act or any action of the offending fraudulent scheme occurred Without laboring our previous the Case" we pin-point several of the most Robinson v. Difford (D. Ct., Pa., Washington. Washington.

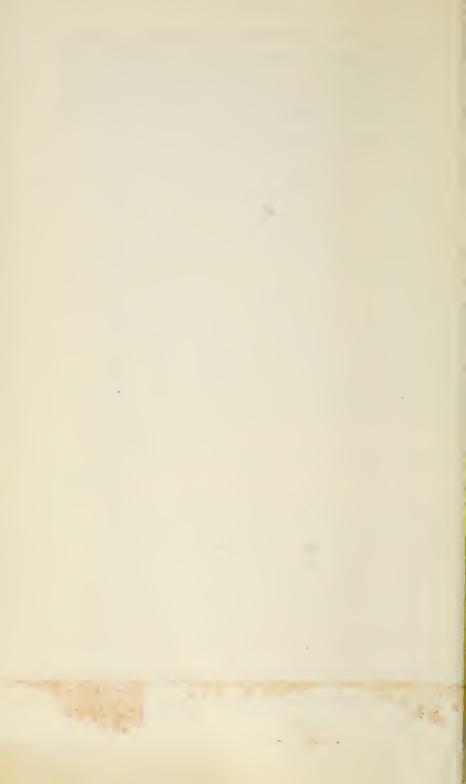
176). Errion took Mrs. Connell's securities and of his fraudulent statements to her in her home Amy Errion typed documents for the transgave her his promissory note (Ex. A-3) in Seattle after which Amy Errion sold the securities on her own account Seattle (T. 94); getting the money and converting it into cashier checks in Seattle for delivery to Errion. ŢŢ there on occasions (T. 126) and in fact made most, bidding First, Errion sought out Mrs. Connell Seattle home (T. 106) after which he called in Mrs. Connell's home at Errion's 665). numerous not all, (T. 720, action



Seattle 25). Dwight and Opal Holdorf at Errion's direction the ļ purporting to represent Oyster contract 811 14th there Avenue North, in Seattle and converted the funds into Corporation and then turned the stock over to Errion transaction and delivered the deed to 221, 239) Olson to sell a Wash. Seattle (T. 676, 684, 790). Even during "lulling" Errion conversed with Mrs. Connell at employed Seattle attorneys to create the Holdorf cashier checks in Seattle (T. 567) and also made then he was staying mostly away from occurred the residential property at Dwight Holdorf presented the receipt document 492) as had been taken from Mrs. Connell. posit in Holdorf's bank account in Vancouver, "Rankin" to Mrs. Connell in her home (T. Connell "Bogardus" contract (T. 484) and the Errion arranged in Seattle for a Mr. transactions with Mrs. Washington" (Ex. A-5) Kellerstrass sold Ore. principal ρĭ activities, tidelands "Seattle, Portland, although some

dated

Seattle; liquidated Commission rule occurred in the Western District transaction violative of the Securities and Exchange The conspirators all came fleetingly is difficult for us to see how Appellants act ļn have the temerity of contending that no perpetrated the fraud Seattle; in sale the purchase and Seattle; Washington. Oregon to consummated could Act



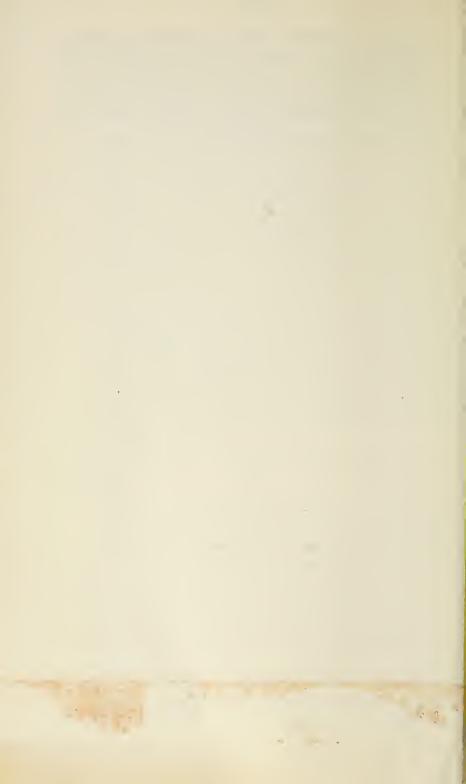
by instances, the "loot" in Seattle and then retired to Oregon and many in activities, their "lulling" control. remote ducted

Action is NOT barred by either the Statute of Limitations or Laches.

Cir., promenced within three years from the time of discovery of Sec. 159(4) of the State of Washington which Robinson 203 F.2d. 627; Osborne v. Mallory (D. Ct., applicable statute of limitations is vides that in cases of fraud the action must be Fratt v. facts constituting the fraud. 86 F. Supp. 869. The 1949) 1953)

until well within three years prior to the commencement The trial Court found as a fact that Appellants conducted "lulling" activities which had prevented Mrs. Connell from discovering facts which would have revealed to her the fraud which she did not discover of her action and that she was not in fact quilty 134, Vol. 2). (T. laches had

October 19, 1949 and this action not commenced fraud days following such sale was later, Mrs activities Court's finding is well supported by Connell's normal opportunity of discovering the Although the sale of securities was until three years, ten months and 12 days the "lulling" frustrated by within ten months and 12 and The prevented evidence. mated on



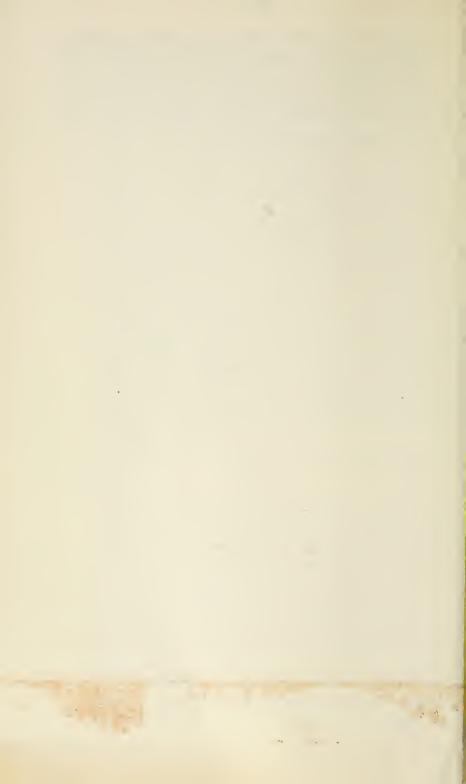
the conspirators.

Bay; await outthe Port of Coos As an The very nature of the scheme frustrated expected to be finished within a year (T. 113). She and Errion were supposed to come of the condemnation action by testified (T. 132): Connell discovery. Mrs.

this our breath until finished. just held to to be finis suit was

that from the very beginning Errion told Mrs. Connell the others about the transaction; particularly lawyers. inspect she wouldn't upset this the only place where Mrs. Connell could have gone to find out beginning not to interfere with the "plan" by talking ឧଧ the very truth about the worthlessness of her newly acquired JO OL the scheme is Errion (T. 110). It was not reasonable to expect was the believed implicitly It was not until the summer of t0 kind investigation immediately after the transaction actually got down to Coos Bay, Ore. lands (T. 193). Errion also told her at widow residing in Seattle to make any Ore. On top of the very nature of stay away from Coos Bay, Ore. so Coos Bay, the early part of the scheme. 249). Mrs. Connell apple cart (T. 133). lands. she 223, during with aged that

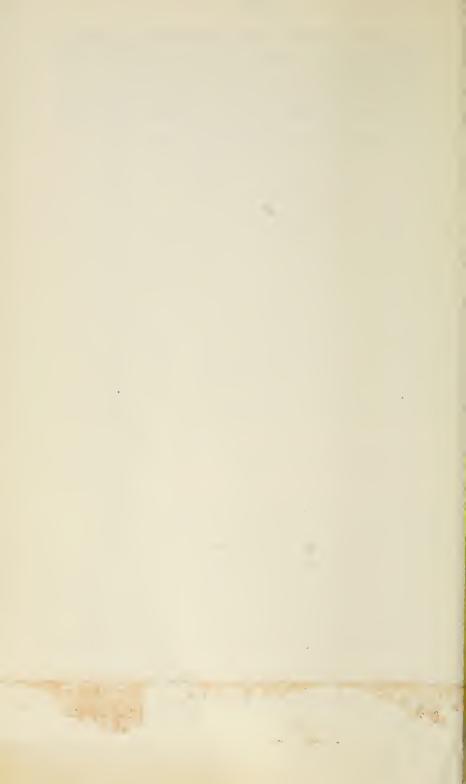
Mrs. extending until Errion's suggestion (T. 117), southern sojourn to and 1950 and Amy Errion took a in July of at commencing course, JO Connell fornia



directfrom prevented, any investigation that Mrs. the her pe-California trip was for the purpose of hindering Mrs. southern inference California certainly could have made even had she had reason to from discovering the true facts concerning the trip, defendant The Court found that this 1950 such in southern admitted that such was the purpose of While no fully justified in drawing Errion for the last half of transaction (T. 123, Vol. 2). Being so finding. 1950. 1f not evidence and Christmas Eve of suspicious. Court was hampered, Amy Connell Connell come the

the truth How-Connell preceedthe condemnation been dismissed. transaction was in Los Angeles on December time it could be said that Mrs. should have undertaken to investigate and learn ever, that date is well within three years next 31, 1953 action which was filed August the Port of Coos Bay, had advised that 1950 when Errion first The first action of this of the

overthat alerted ಥ qocnby she Ļ suggested by Appellants in their brief Of course, Appellants taken back from her promissory note (Ex. A-3), believing the been put on inquiry when looked mentioning that this promissory note dated pe receipt, and that had she shown it to anyone, ment could have been explained to her and she promptly the probability of fraud. should have N SO SO 1949 Errion's 12, It is Connell September took



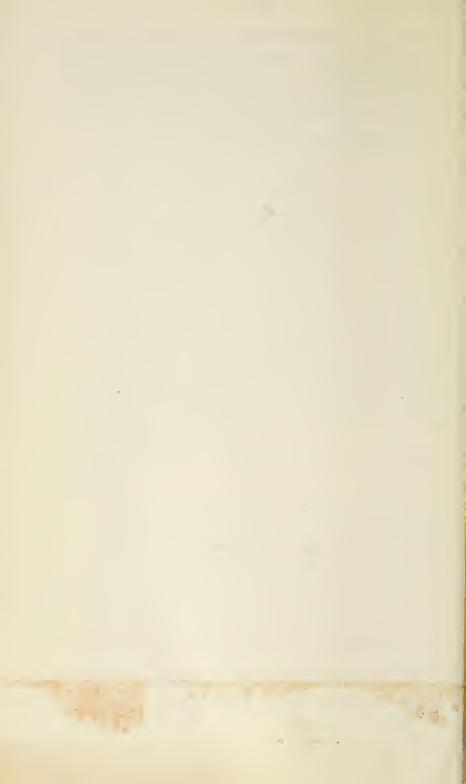
A-5). 4 Mrs she show (Ex. 200 and to a receipt, 1949 enough understood 19, long October ងន the note instance had of the note on or before treated possession in the first conspirators conspirators had anyone Connell

not go far enough when relying upon 682. the fraud law the P.2d. familiar principle of by date. 210 fraud dates from when a victim diligence could have discovered a later 864, 2d. at 34 Wn. not when actually discovered ದ Estate, enunciates go Appellants Sackman's discovery of which merely que of cise

equally important and pertinent principle This doctrine Court or imped Suprem charged the ٥, the Johnston 810 taken by defendants to hinder ₽ S is recognized by tolls the time when a plaintiff ь Ц with constructive knowledge of the fraud. 177 In 562, Washington. 104 Wn. of fraudulent concealment co. (1919) the State of 570) Another action (b.  $\alpha$ of that Spokane Court said:

running to have be some sufficient conv. Campbell, 15 Wash. Galland, supra. some the the defendant must or with cealment of fraud to interfere with of the statute of limitations where are readily ascertainable. There nhindrance or impediment interposed the is not concealment by Sackman v. Kline v. Gal silence "And mere 495; K that effect. fraudulent Wash. Pac.

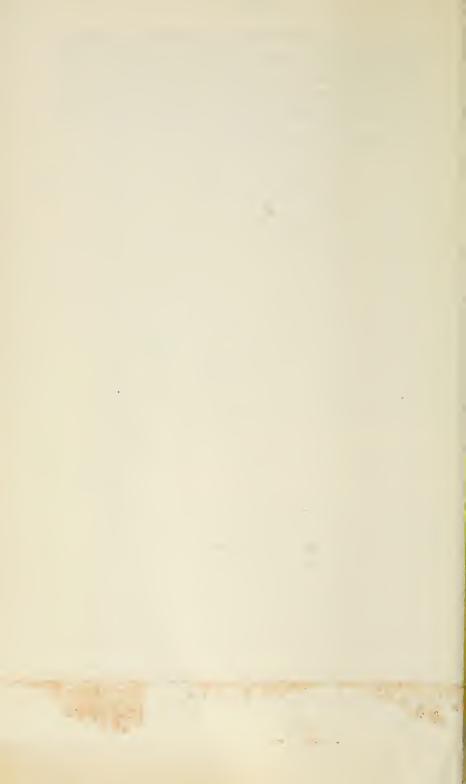
observation for same District Court the made Washington the Likewise, Of District



plaintiff deceitful conduct of statute does action through that where of the discovery. from bringing fundamental concealment, or operate until defendant, prevented "It is frand,

frauduof 889 action there defendant subsequently falsely re-assures need Owen peen sufficient value at 00 > suffi 2d. consummation of such acts sale induces 582, has of concealment Texas to it provided Wax the truth, renders the concealment accruing of the cause of the of > 50 cir. 1944) 146 F. concealment Co secret, it Statute in 173 A.L.R. statement, word or act which tends discovery. > misrepresents such is Securities Co. time of the 271 Producing & Development sold prior Acts transaction a is fraudulent constructive 2d. to prevent Parker 20 N.H. 187 (memo at land 3 S.W. where a defendant even 183. plaintiff and Pennroad Corp. t t to quality of A1 subsequent to the coincident or 1942) 128 F.2d. relation or design concealment App., 1928) to keep the such action date of from running. ಡ suppression of (1849)Q Hickok to toll plaintiff as t0 Where example, Com. affirmative > рe sold held that plaintiff Overfield (5 ctr., may Cutting tations pe (Texas clent (609) ಡ land For

prevented bar made Or the case at impeded which in acts Whether Appellants Or statements mative

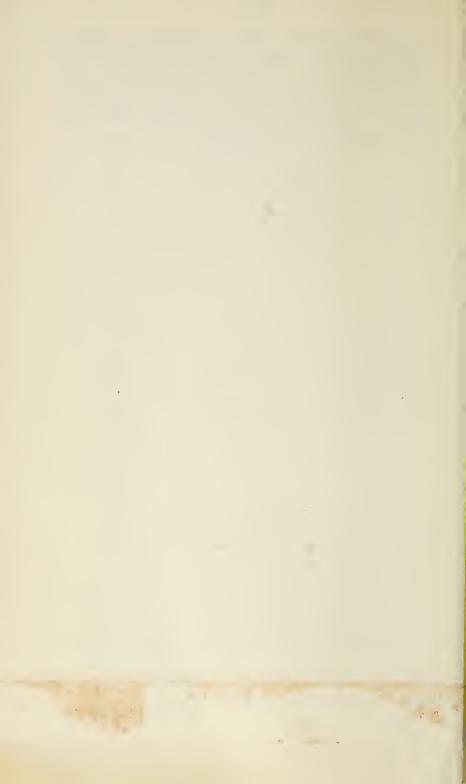


trip with Amy Errion to southern advised not to talk about the transaction with particufrom would trial Court's findings No. a 74 year dis-148 Pac. Court stay away that 13 not year "Oyster" in this the fraud trial and did have reason to have discovered facts 369, and experienced Appellants versus three of the surrounding circumstances in Coos Bay; nature of scheme; advised to the ultimate fact that Mrs. Connell the. parties involved representation in Seattle of Anderson, 85 Wn. the fraud until well within the from earlier discovering fact to be determined by the six months California fully support the > Cornwall characteristics of period. ದ Connell others; and of widow; statutory case. Coos Bay; or from all question reveal of old

28 con-Jo Nos. listened to the testimony and observed the witnesses No. who time affirmative acts of pertaining to some of support with Findings Finding judge the ultimate fact of the trial should not now be disturbed on appeal. Such finding as made by OL 2) stands in mutual activities 2) stating (T. 123, Vol. "lulling" Vol. 21 discovery 134, cealment and 19

contending findings evidence in error Court's the in by are trial supported Appellants the not

supported not are findings the that contending

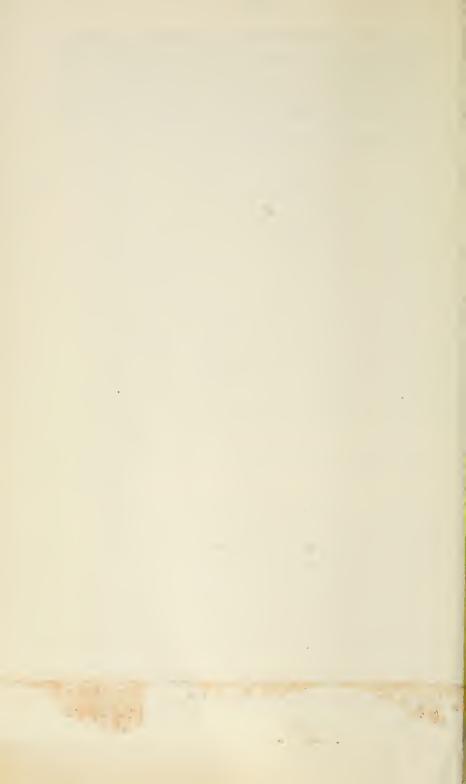


assert discogent law has upon common to and Connell are content merely clear "odious" (as Mrs. þŷ that Mrs. Connell's case is predicated be proven evidence, Appellants it must that fraud is and that covered) the fraud;

Connell Ιt In no respect have Appellants undertaken their Mrs. has failed to sustain her burden of proof. incumbent upon either this Court or Mrs. pointing out specifically where or how pick up Appellants' "laboring oar". task of not t0

Rule X-10B-5, even if short of the common law criteria Norris & Hirschberg, Charles ſz, fraud is sufficient to establish Mrs. Connell's case fraud As to burden of proof a violation of Sec. 10(b) Since the non-securities are so inextract-85 434; Pierce, Fenner & Beane, comingled with the securities in this single suffice 228; Cir., 1943) 139 F.2d. S.E.C., (D.C. Cir., 1949) 177 F.2d. burden of proof would as it relates to securities. v. Merrill, Lynch, S.E.C., (2 believe the same Co. v. well. 104. & Inc. v. ងន Hawkins so far Hughes ably them Or of

this trial Jo evidence which offends the common law In any event, we do not see it necessary for to determine the niceties of the two criteria convinced that the findings of the are supported by clear and cogent scheme that fraudulent as we are ಹ Shows proof

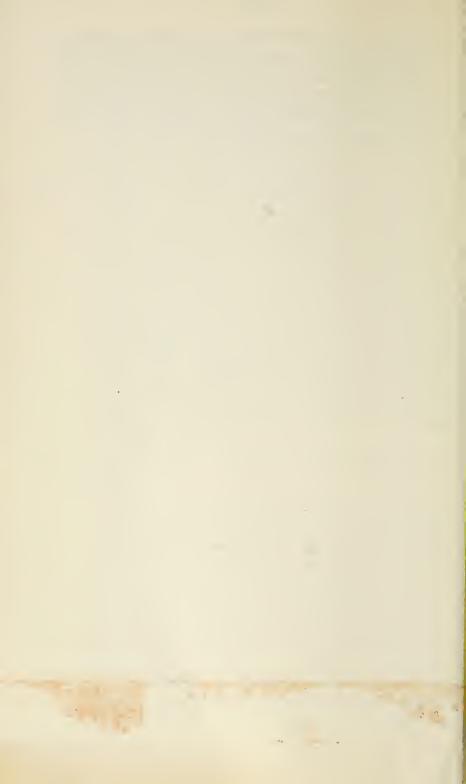


U.S. not misleading 312 112 light of Stuart & Co., constitute fraud apart from any Rule X-10B-5 Cir. circumstances under which they are made, \_ the 920, 929, reversing order to make statements as made, in Ins. Co. v. Halsey, L.Ed. Equitable Life 85 410, 668, 302.

Such evidence is not only sufficient but in most cases it is often necessary, be met by circumstantial evidence. also well established that conspiracy can be established State of Wynne v. Boone (D.C. Cir., 1950) 191 F.2d. 220 at page fraudulent can, Missouri (1873) 84 U.S. 532, 21 L.Ed. 707 at page 710; from a Connolly v. United proof The inference of fraud 1s often gathered Rea v. 433. Borgia v. United In a case involving conspiracy and a scheme, such as we have here, the burden of Cir., 1935), 78 F.2d. 550, 555; Pattl v. circumstances and common sense. Gishwiller (7 Cir., 1947) 162 F.2d. 428, is the only proof that can be adduced. (9 Cir., 1927) 17 F. 2d. 562. circumstantial evidence. chain of States

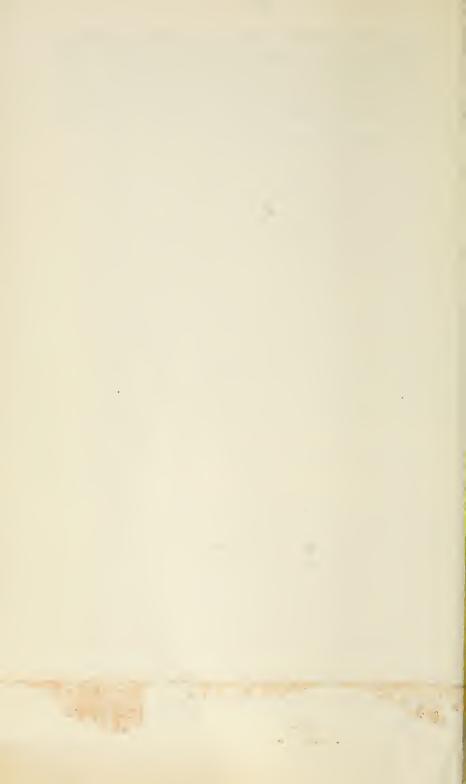
measured with the view that they all acted in concert The case as to each of the Appellants must be οĮ purpose for the unlawful frauding Mrs. Connell. out a scheme carrying

secretary took Mrs. acted as Errion's pertinent documents (T. 161); ERRION, she AMX 20 typed AS



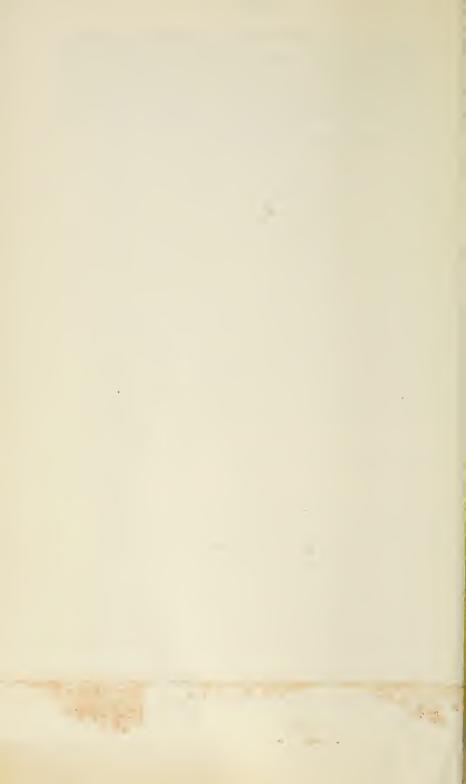
bidding Angeles business cashier meetings almost every morning in his Portland apartment, Connell from and was present when he induced her to sign the paved the way by giving Mrs. Connell measages southern California for six months at Errion's and gave to her husband (T. 665); and kept In Los When Errion held Seattle (T. 94, 664); reduced the proceeds to (T. 117); sold the corporate securities of Mrs. proceeds herself (Ex. 67; T. 668). "Indenture of Lease" (T. 123). participated.(T. 284). checks Errion

She partly to Holdorf's account apartment with companionway between and shared a single maintained a joint bank account in Portland with Errion obtained, she his money (T. 565, 585). When the property of Mrs. dependent upon him for support; lived in an adjoining into fur of it in \$11,400.00 net purchase price; converted it into took title in her name to conceal true ownership and "fronted" for the sale of same in Seattle (T. 566). 284); telephone (T. 572, 519). She took messages, wrote Errion having a power of attorney to use (T. 576); a safe deposit box in 1949 in her name with VIOLET KELLERSTRASS, as sister of Errion, letters and kept records for Errion (T. 470, converted the cashier checks distributed all Connell's at 811 14th Avenue, Seattle was cashier checks and then deposits series of cashier checks; confusing opened 100k ther



joint the Portland 13, 14, 15, 19, 20, 21, to and partly had with Errion in a Vancouver, Washington bank 35, 18, account which she of Ex.

on crossbusiness; land; he retained 52) \$22,500,00 time Lease" on intended to cultivate oysters on it; knew nothing Forest Products scheme Williamson, effect was unable to plant "oysters" as represented "oyster" had no money of purchase part of such land came exclusively from each 59, of silt damage; he nonchalantly admitted period home signed the "Indenture of 12). Appellant C. W. WILLIAMSON came into the Errion had nothing to do with his "Oyster" would have exploded December of 1950 to effect the (Ex. 79) to the Corp. (T. 1043-1052). The exhibits show that 58, received money to pass on to Mrs. Connell, His actions clearly bring unlawful purpose of the entire conspiracy. Errion's bidding; he had never seen the participation of C. W. January 15, 1952 (Ex. 46, land from Mrs. Connell; and that part of it; \$750.00 on June 14, 1951 (Ex. he forwarded to Mrs. Connell over a alter ego, National about the claimed silt damage; 1953 he wrote Mrs. Connell scheme examination that he had entire fraudulent Holdorf or Errion's false Connell. \$1,000.00 on of 1950. "front" in knowingly such 31, Mrs. he because never which ಡ ಜಜ



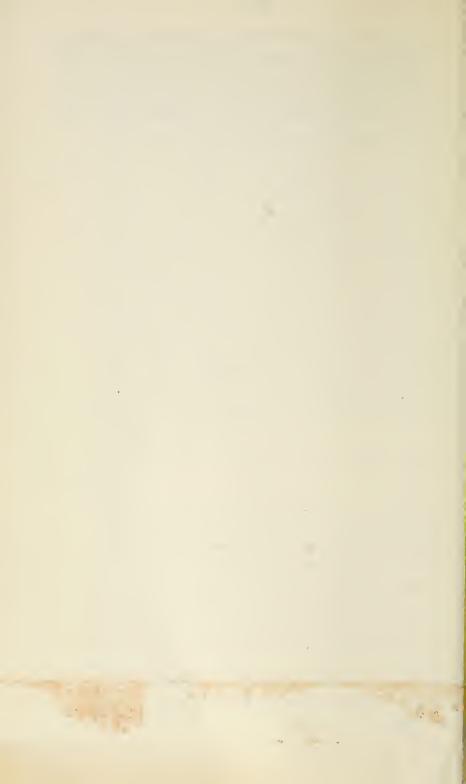
fraudu-Appellee's Statement of the Case amply shows center the share in the organization and leadership took the lions course, of Appellant Errion was, scheme; he fraudulent direction,

of Williamson conspirators and liable with the rest F.2d are none the point 1938) 96 and 3 to after the others Violet Kellerstrass and C. scarcely have United States, (6 Cir., the principal transaction they the conspiracy M M conclusion, fledged" Bogy v. Ţ even "full

hence her in the relation not place he Appellants; of Coos Bay condemning er" land did not place pari-delicto with Appellan no defense to this action. Connell's part in "Oyster" Mrs. Port

contention made by Appellants Appellants in connection with the Port of by expressed that Mrs. 1068 values to detriment of views coincide with those their brief to the effect Court in its oral opinion (T. the with to pari-delicto "fix" come now Our of their plan to 31 trial Bay. Coos

required \$1,200.00 per acre for the property which was along as outlined by Errion to "establish pe went passively Coos Bay would Obviously, Mrs. Connell Port of the that the "plan" 80 values" pay

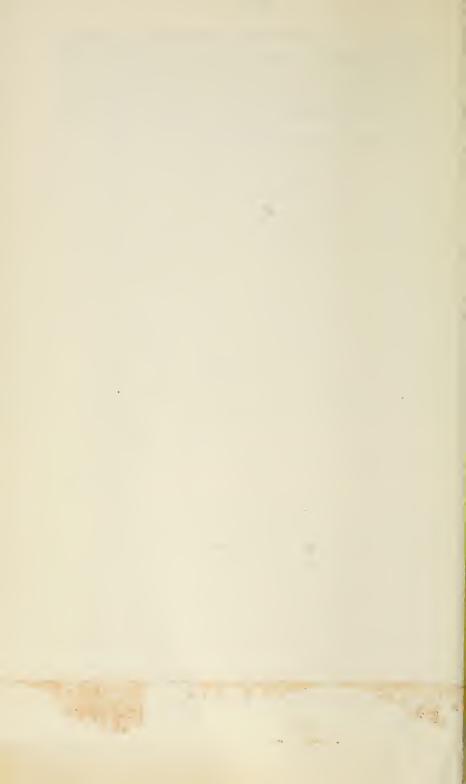


Would not does Connell Mrs. Connell in pari-delicto with Appellants Such passive consent Mrs. only worth \$100.00 per acre, otherwise been defrauded.

\$150,000.00. was suffered by the Port or anyone unjustly enriched. and no damamazing her securities and other property for 125 acres of "Oyster" Second, although Mrs. Connell gave \$124,180.09 worth of acre. land worth \$1,200.00 per acre; only the Appellants had Connell thought she was exchanging for her securities, Third, the Port of Coos Bay voluntarily dismissed the inferthat Appellants took back from Mrs. Connell the First, Mrs. per the for and reputedly worth \$150,000,00, leaving the was worth less than \$100.00 condemnation action which they had commenced she was in the "plan" to make a profit, promissory note (Ex. 76, T. 980) difference in value between her securities Three significant facts appear: reason to know it \$4,282.00 fact is land

905, from seeking back that which was taken, merely because A victim of a fraudulent scheme is not barred have involved the victim in a plot to 130 Fed. defraud another. Stewart v. Wright (1904) affirmed in 147 Fed. 321 the scheme may

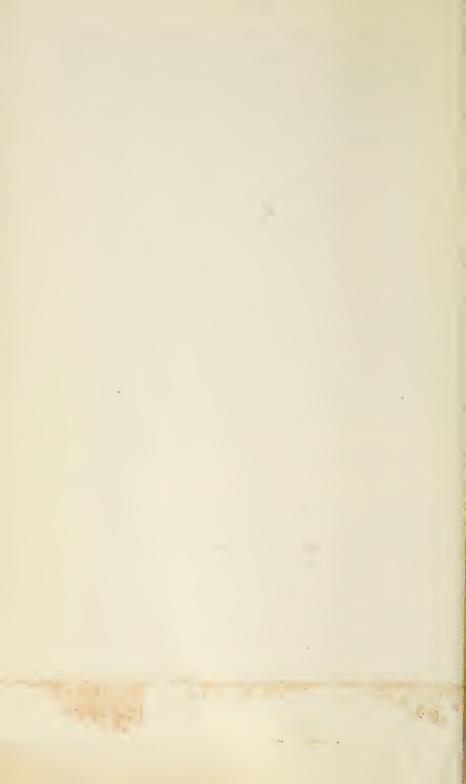
that distinguish-2d. 711, case at bar because the plaintiff in scheme with P.2d. 876 relied upon by Appellants is case of Paddock v. Todd, 37 Wn. affidavit in a false ಇ signing from the by able case



and corporation ದ had actually defrauded scheme. the ρχ defendant benefited

さた Nuveen (5 Cir., 1944) 145 F. 2d. 684, cert. Okeechobee Entrusted for Illegal Use", 8 A.L.R. 2d. 307. another for an illegal purpose may recover See, also: proposition, one who has back so long as it has not been so used. 324 U.S. 881, 89 L.Ed. 1432. general ದ denied in County v. t t

Pinckston v. Brown, 56 N.C. (Jones Equity Vol. -dord aged widow-mother was threatened to relied died) held The North Carolina pari-delicto. de-Many cases permit a fraud victim to recover by The son had for that although the victim might have been in of third person, that while the mother was in delicto in scheming to back her is the 1857 such victim was not necessarily in pari-delicto. She had an adult son who she scheme trust erty from the son's administrator (he having taking over all of his mother's assets in The son concocted the permitting the mother to recover creditors except the holder of the note. she was not in delicto, in an agreement to defraud a haps the most pointed decision of all the mother list fictitious assets. creditor III) 494 wherein an on a note. upon very heavily. the note said: Court cision of in be sued defraud The

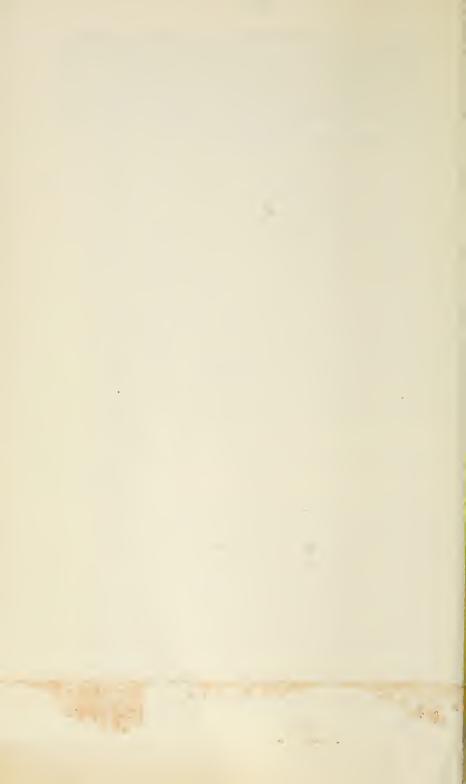


however, undue influence or great inequality of condition, or age, so that his guilt may be far less in degree than that of his associate in the offense. In such cases the Court will grant relief in favor as not are truly in pari-delicto. For enforcing, however this rule, it is not sufficient that both parties are in delicto, concurring in the unlawfulthey must stand in partial other. cumstances of oppression, imposition, hardship, undue influence or great inequality of condition, or age, so that his guilt may be far less in dea plaintiff who was particepts criminis as n ng in pari-delicto. Such is the decision of being in pari-delicto. Such is one decirionate the master of the rolls in Osborne v. Williams, the master of the master of the master of the rolls in Osbornes. 'Courts of cirthey must stand in pari-delicto, for there may other, and very different, degrees their guilt Judge Story, in the 1st vol. of his Equity, section 300, says 'one party may act under of the standard of the standard of the section 300, says 'one party may act under of the section 300, says 'one party may act under of the section 300, says 'one party may act under of the section standard sta 18 Ves. 382. The master observed, control law and equity have held that two parties the and equity there is the parties of the section. concur in an illegal transaction, deemed in all respects in pari-delicto. consider this agreement as substantially an illegal transaction, the of act of

fatigue" discretion in refusing to further delay Wrs. Connell's day in Court because of Errion's "battle fatig exercised its Court soundly Trial

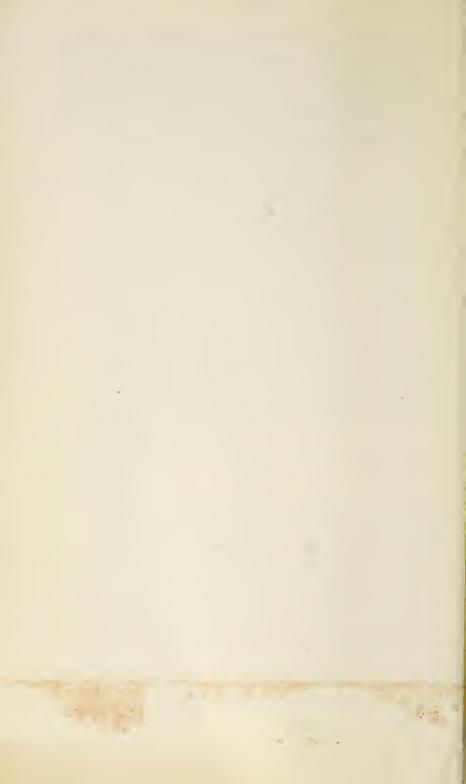
of his alleged diabetic condition which "depression" tactical battle of Mrs. Connell, age then 79 in seeking to get her day in Court in face of Errion's many delays the comparable to "battle fatigue" (T. 76). and went Was this cause and his recently acquired 1953 31, Collateral to the trial of commenced August 1954 ń 1950 obtained on basis on November action was described as since he had trial This

Errion drove seen in vari 2); met people in hotels; the trial, office; was record that prior to to his doctor's 100, Vol. We have of go down places could ons



admitted not state that Errion had made sufficient improveto allow him to let Errion enter into any business unable to say when, if at all, Errion's condition would condition had improved, he, Dr. Dickel, "depression" could not give an opinion and his expression would litigation Errion's condition sufficiently to express an opinion Dickel was commencement trial (T. frankly He testified that Court. to Herman A. Dickel of Portland, more or less a "guess" as he had been unable car and engaged in business other than When examined by the Court, Dr. t0 testified that he was treating Errion for As to this, the doctor the the get permit him to appear at between April 15 and just prior to seem to trial on November 3, 1954. couldn't activity (T. 74). just psychiatrist, Dr. though Errion's such as to He (T. 72). could ment

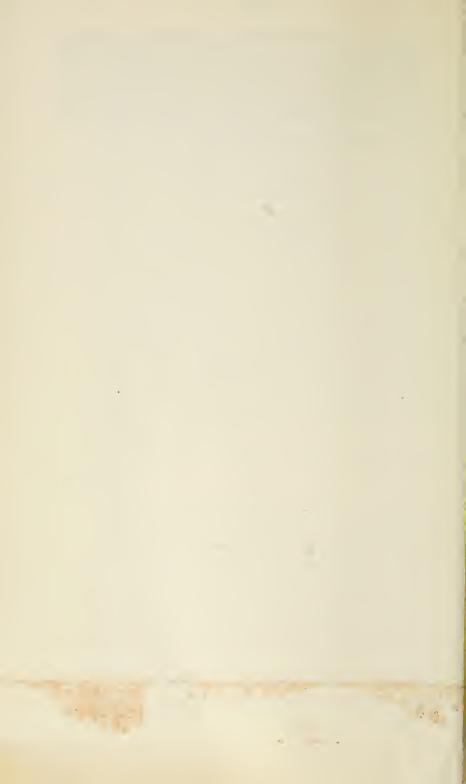
health. not getthe consideration of according to Mrs. Connell, a 79 year old widow, 40 ass While the prospect of attending dated September 7, 1954 and presented part ting into the battle was affecting Mrs. Connell's Seattle psychiatrist in ļn giving Errion "battle fatigue" the delay trial Court was also faced with Connell's condition of health Court, Dr. H. M. Landberg, a 133) Item (Clerk's day in Court. affidavit scribed Mrs. The follows: Was By



ical evaluation of Mrs. Marguerite Conneil. The patient was seen on two occasions for approximately dence or mentar deterioration. Her recollection of both past and recent events is quite good. Emotionally, it is found that she is in an extremeof a psycholog Connell. The three hours. It appears that Mrs. Connell has a very keen and alert mind, with no particular evistate which is super-imposed upon Her recollection state of severe anxiety ..... summary that Mrs. deterioration. Ø following of mental panic "The ly acute chronic dence

the horrible above mentioned factors are, first, her having to realistically face being involved with some unscroupulousness of mankind and secondly the possi exceedingly extreme and 1t is strongly urged and recommended that her present ordeal be culminated excessive verbosity, unconscious desire to do anything and everything possible from having to possibly face the horrib reality with which she may be confronted. The It is quite obvious "Two Factors are now producing her acute present is longer endure The exciting causative factor and thereby possibly insomnia, extreme anxiety or nervousness and turbulent a general to alleviate dire poverty. tenseness at in her present extremely cannot much panic episodes which consists of as rapidly as possible so as live in collapse. of a hypo maniacal state, of her emotional she bility of having to that her total state. apparent exist emotional prevent degree and

-uido or psychiatrist on the one hand, only one which could be made in view The fairness the exercise to continue the trial chronic an In fact, such decision of Errion at best to express ಹ ದ severe anxiety, who sought for over year old widow with Faced with the "battle fatigue" of to when Errion could attend trial. degree of which was highly uncertain and Judge in Errion's psychiatrist being unable day in Court, the trial sound discretion refused his 62 on the part of date. the the other a trial Was judge the of and, on her "guess" ಜಜ his state trial ton

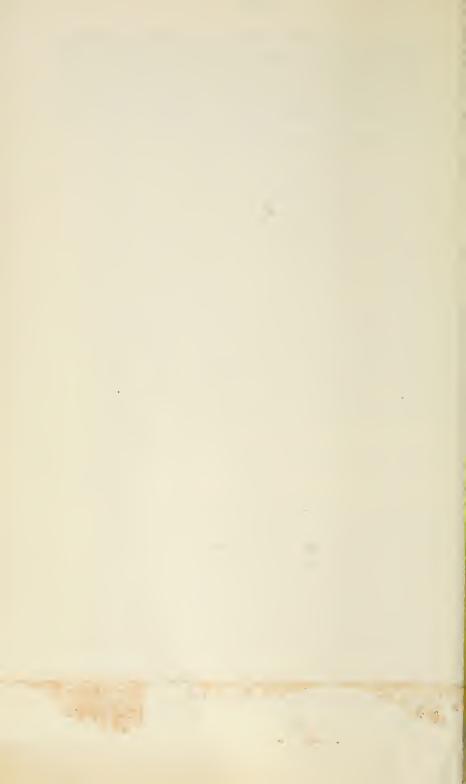


the taking of evidence on November 19, 1954 (T. 1057 conclusion was orally new trial move for 1955. judge was further exemplified when he Errion to appear was made pending motions for 6 the 1954 when the case significant that no February door open for Errion's appearance at denied and again on December 29, argued (T. 1067). It is 26, 1955 January the trial f11ed of

Kellerstrass in err summons. Court did not e tion of Violet of to quash service denying motion

experi who was complaint at her ground floor apartment at with at S. E. 16th Avenue, Portland where she resided Service was made by an enced Deputy Sheriff of Multnomah County, Oregon specially appointed by the Court in this case to served served Appellant Violet Kellerstrass was Process was 1954. 36-38, Vol. 2). brother, Fred Errion. 6 September P.M. on process (T. summons and 7:30

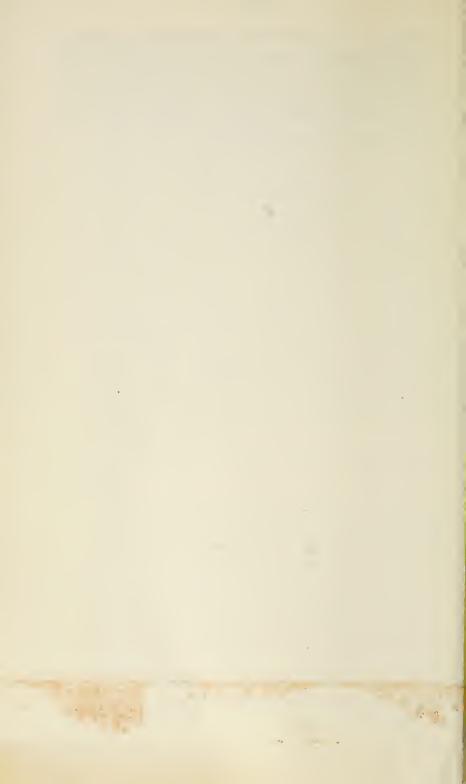
he that Fred in Fred her apartment; apartment; When Fred apartment, through a hole back room as her brother, service, Sheriff Collacutt also verified in the Kellerstrass was in the screened door. came to the front porch of apartment and recognized Mrs. Kellerstrass He screen door. the open but back into a into manner of the Errion denied Mrs. papers delapidated 40 40 he saw her step the came that Errion fied



age the over Was and same apartment 544) the (T. Errion lived in years

not in her apartment until floor during them; gone to the apartment the 527-529) that and at She then testified she never saw the "papers" on didn't even "peek" testified that she the apartment; floor. (T. had a friend and was were still on the tn 1 which time she in question she the papers or read them; brother Fred Errion resided Violet Kellerstrass the front room. above to visit they 10:00 P.M. at the evening that and

Kellerhis dwelling proof person of the family over 14 years of age. some person of suit-Court at service suffi Jo the that Procedure. 34) It is the only be served upon defendant Rule 4(h) amendment of only objection which Appellant Violet process is left at the residence of Oregon, service is Court (Appellants' brief p. Federal rule provides time of trial was that personal Civil Procedure provided that the at the Civil thereof Furthermore, This was in effect done by discretion may permit 558). of usual place of abode with copies Rules law of the State of had not in fact been made (T. This was done, and discretion," The point urged on this appeal complaint may by leaving 1-605(6). in its at "personally or the Rules of with a made summons and service. The Sec. 4(d). Under the J. age time house or strass clent



Collacutt. testimony of Sheriff accepting the

and it Errion be considered she was present taken; default was and prejudice resulted as no stipulated that the answer of Violet Kellerstrass the trial of at answer testified 200

## SUMMARY AND CONCLUSION

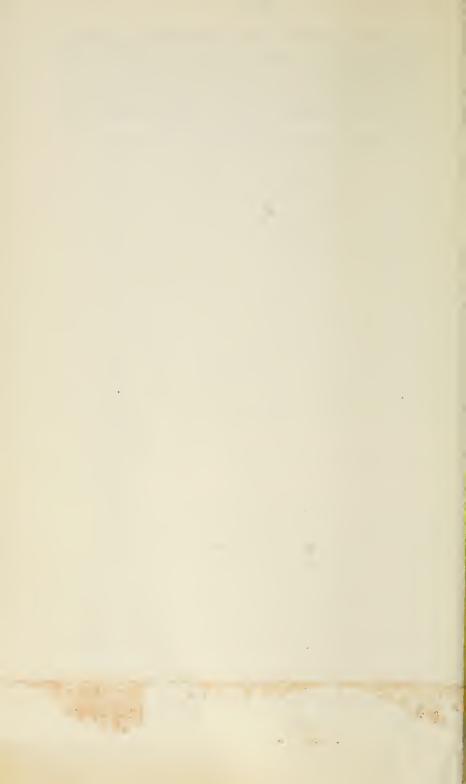
law other property worth \$124,180.09 With fast talk, ingenious false representations common \$12,500.00 sell the Rule X-10B-5 of Commission, Appellants induced Wrs. Connell to scheme every bit as much a breach of the for 125 acres of tidelands worth less than \$83,077.49. Sec. 10(b) of the Act and her damage in amount of her securities and of ದ and

scheme Court had jurisdiction over to find the fraudulent Appellants judgment. The District the the and award cause and

statute year action is not barred by the three limitations nor by laches. The

supported the Findings by the evidence. the District Court is judgment of and Findings The

pari-delicto in no way in Was Connell Mrs. Appellants. in not cause in discretion the heard who his Lindberg not abuse William J. did Court Judge District



fatigue" Connell's day in Court alleged "battle this action was commenced. letting Errion postpone Mrs. indefinitely because of his arose after that The motion to quash summons served on Appellant She suffered after the case properly denied. being held in Violet Kellerstrass was error in such motion was denied. prejudicial

the to Appellee. justice, the judgment of costs court should be affirmed with the interest of trial

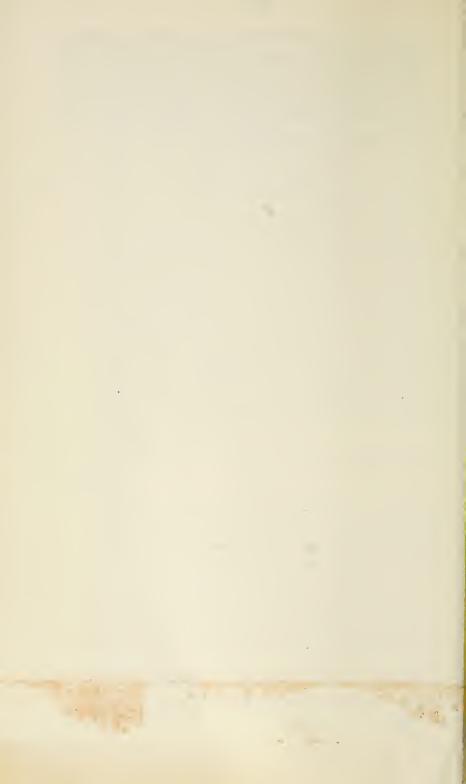
Respectfully submitted,

S/ WILLIAM F. WHITE

William F. White White, Sutherland and White 1100 Jackson Tower Portland 5, Oregon

Malcolm S. McLeod 821 Dexter Horton Building Seattle, Washington

Attorneys for Appellee.

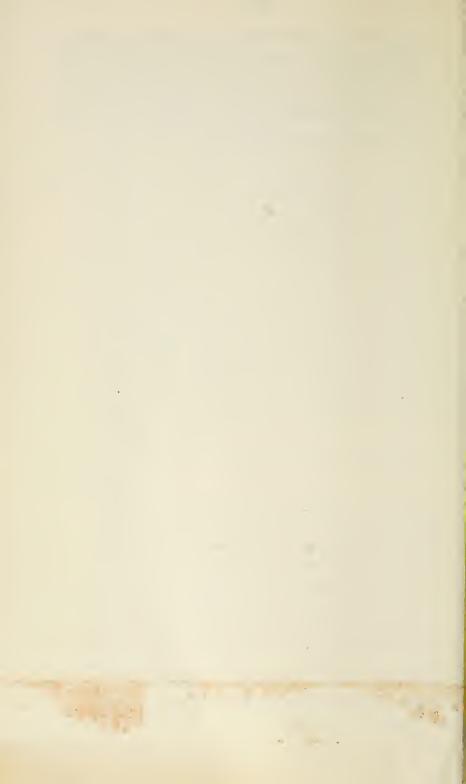


## ROCEEDINGS

question of liability now. course, formed impressions as the evidence went briefs believe reviewed my notes and I have studied the Н Well, Gentlemen, opinion on the THE COURT: give my FO.

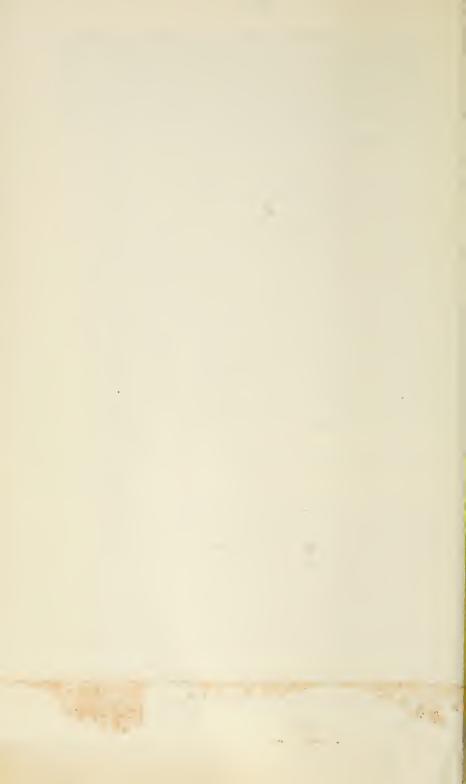
closed here that there has been a fraud perpetrated upon the Plaintiff, Mrs. Connell. It is clear that that It is clear to me from the evidence of perpetrator principal the first instance. Errion was the

and the fact that there must have been some understanding, the Holdorf negotiations with Mrs. Connell, that establishes to my mind and between Mr. Holdorf and Mr. Errion, that secure lands indication of some - of an actual consideration by Was 40 Mr. Holdorf and his wife and to the corporation, the placing appears to me, however, that when a deed, placing revenue stamps on it ì of 20 properties from Mrs. Connell, and securities, Oyster Corporation and the transfer of these participation of Mr. Holdorf in the original securities, first fraud that they were attempting the part sideration is given to the development of mortgage without value, have been, on the part though it may believe was all H ಡ ಹ of giving of this was Holdorf



the transaction to obtain these properties of lands give her in lieu thereof oyster or purported oyster lands. ot a part to

While Mr. Errion, who apparently is a fantastic indicates reliable and that he had land worth something and that short and helped formu-Counsel sonality and charm and persuasiveness, whatever it may and while action the value seeing him or hearing his side of the case it be, to make Mrs. Connell, and apparently in other inability the advanat that such as the Skene case, believe that he was not have been a written or an ٦ţ -un by - with lack this whole scheme was - misrepresented of obvious that he was able through his magnetic ಜ್ಞ ‡ of he, Mr. Errion, was the principal perpetrator, difficult for the Court to believe that a man, is, couldn't have understood that this sale and perhaps, and as young as Mr. Holdorf there was them and common course program whereby they could realize their property in cash and possibly more time through a proposed condemnation action of persuasion - while the Court hasn't had endowed with tremendous faculties oyster land which he participated in think tacit understanding between develop ď Н inferred. fraudulent and, therefore, Conspiracy can conspiracy need pe may agreement. It schooled he had a tage of stances person, οţ

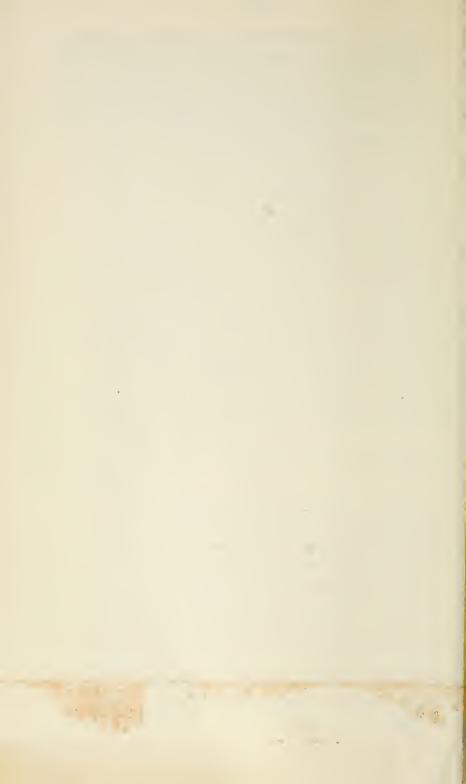


practipart of Mr. Holdorf and Errion λq sufficient, and participation in it, which matter Skene matter outset, not only in the Connell in the time on the the same certainly was at

Holdorf finding between Mr. the Court's Connell. a conspiracy þe defraud Mrs. Therefore, it would exist Errion to there did Mr. and

That or there of this transfer know not. think, time Mr. Errion and Mr. Holdorf negotlated July the Н It was in existence, the contract in August or course, I far as October. abouts; completed, in part, as started, of Connell's property, in it not necessary. When first sale of

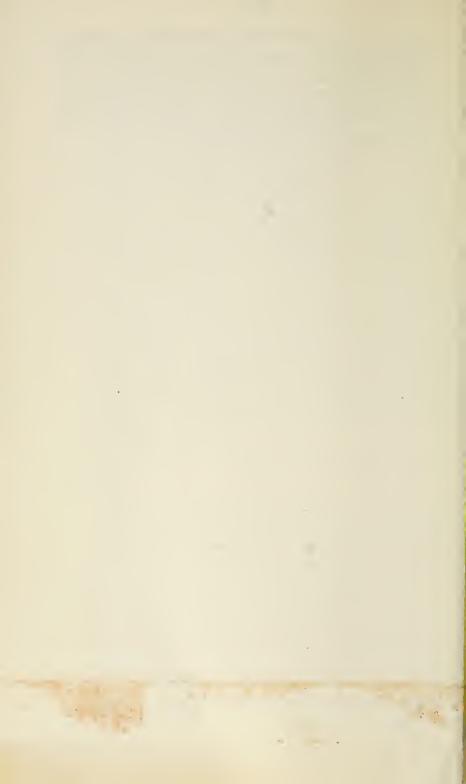
Holdorf, Mr. Holdorf Following the matter down through the course the particisigning certain actions stock then the records, 13 could be by themselves innocent actions, connection, course Mrs. later occasion when and while it Mrs. Holdorf and in connection with the the other Defendants, I think the wife, and and the transfer of contracts involved, being entered on taken, such as the incorporation transaction, the fact that papers in that part of that conspiracy, ದ acts done by Holdorf on the the issuance of stock Errion without considered Holdorf of Of Mrs. witnessing many whole Jo the and ದ are pation became that were to t



then the cor Holdorf time, which of one the Court so enterwas not and combination this in indicate more than innocent participation a wife of a Defendant, an active officer of engaged in this whole business Mount Helen property of Holdorf participated of the whole course iod she must have had some knowledge, and over a period are things, a Mrs. and acts. scheme performing them as the and actions endorsed, those administerial these acts as certainly over given on this whole one knowledge. circumstances and Was performing performing prise and of poration the note mortgage but was fluds, would such

visiting innohave pe are again we enough and under some dircumstances might and performing acts which in some instances entertaining Amy Errion, there ಭ such As to Mrs. considered laudable, Errion.

fantasagain only have Or evidence the ₽ Ct seeing this transaction not must Errion, engaged in some rather fashion, in him from testimony the such a man having the benefit or advantage of such as Mr. seems from essential wife of very One married to one H in impression of that he was participated promotion. ಡ in him, certainly put way idea scheme or has an casual шe not she form t0 воше hearing seems that case ಹ had in



when occasions it would appear that mention is, in Mrs. but particularly them present on occasions when there were That affairs Later on, Merrill-Lynch and had and Mr. Errion. been social transactions, and 1949. in the Summer of they may have between Mrs. Connell took them to these on those was 1 days, was made of were and she theless early ings they tles and

securi

some

of

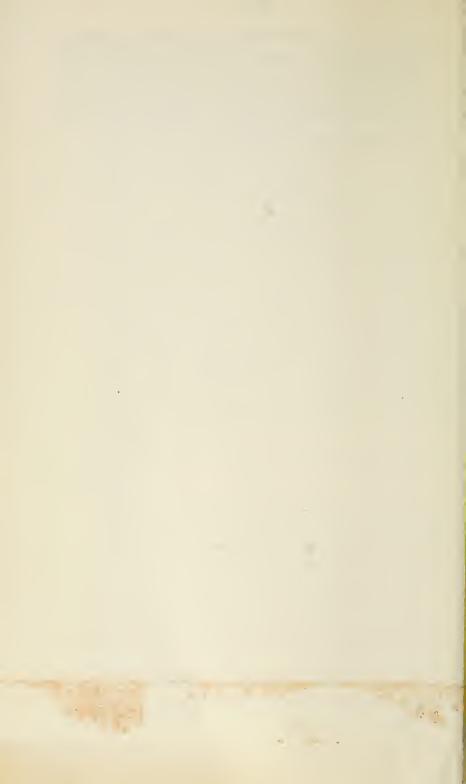
originally took delivery

She

occurred 100 keep trip think program to, had that that in California. reasonable inference to believe that a scheme to, or fraud the from suspecting Connell Cilifornia was part of with Mrs. continued. Mrs. Connell Errion was Was 1s and it

Errion with Mrs. Amy participated likewise, and believe, conspiracy Н So, the Of part ledge. ർ

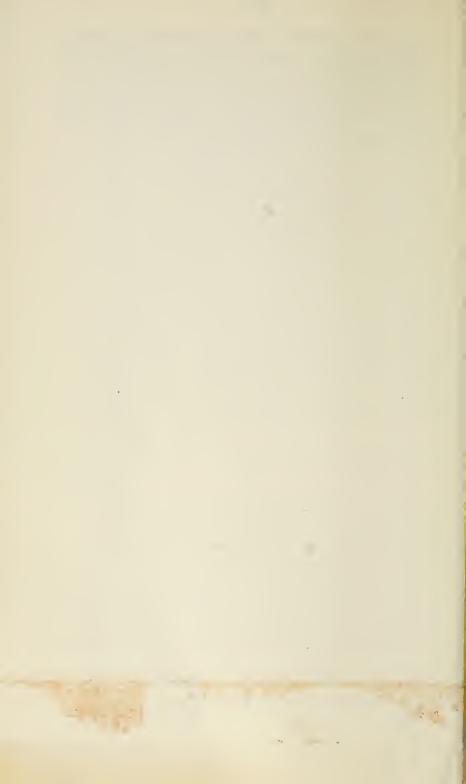
mind conclusive of the case defraud realiza evidence or and ងន secure out common other than circumstances, times undisclosed in these conspiracy cases, 100 spelled no times held, you can not not secure direct conspiracy would be 1s a my 40 not it t are Therefore, Conspiracies are to remain such or there and case, which many scheme 000 could They are have nothing purpose. ದ course, ı this of have so many specific existence conspiracy. ln their Of out. happened you have Jo of written the courts dence where they tion ಇ Jo



and be rather almost such as here been down there, as I recall design on the part of everyone who particiţ entered into this agreement and carried along with it, Holdorf of which certainly a letter written that he had intended to develop the and had failed to do so because of silt out here the as Counsel for the Plaintiff stated, Williamson. learning beds on the money from Mr. payments under the contract, all get at one time and having come He and undertakes an agreement Connell from looked at oyster Likewise, the situation as to unbelievable. seemed to me to a man would of keeping Mrs. to think that time he hadn't evidence, and received been swindled. to be almost the stand oyster business having Coast it and indicated, oyster lands story on unbellevable heard about to me that to make the ಹ pated in 1t she had indicates Atlantic and at seems

might not finding ಭ peen Perhaps they had in mind that she them to justice. statement to make a might have speculation that enough to bring their minds. intend by that crossed in live long but doesn't such

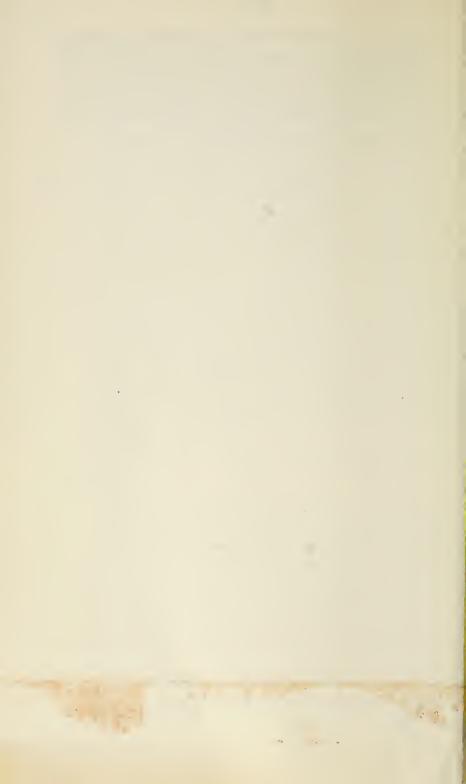
gave state-It on reconcile the testimony she stand and her attitude and response. property her to Mrs. Kellerstrass, I recall this of sale the to undertook rather difficult the who As on one



Without couldn't have cashier's sister engaged in this the various persons the and come up here and secured and, She was and sign the instruments and secure the Jo She having some knowledge of this whole thing part program and must have had knowledge. or Fourteenth Avenue. ದ Mr. Errion and believe, was them among Н participated with undertaken the sale likewise, and divide Twelfth Avenue, fore, she spiracy checks funds

200 some money the 1mpeach her discredit her Mrs. Connell look at this another Errion and Errion transaction she ಭ that was occasion testified as she did in what is known without Connell on that she on this occasion loaned gave her securities to Mr. or Mrs. with Holdorf, certainly that does tend to seems apparent that completely sold, so to speak, on Mr. transaction - or such as would On the other hand, when you statements and the Now, the fact that Mrs. of her testimony and it might be accept his separate transaction it willing to it was a witness. Kinel case challenge. testimony when she effect whole

and while this this her go into transaction indicates the persuasive powers of with The mere fact that she would talked and he there down she went and



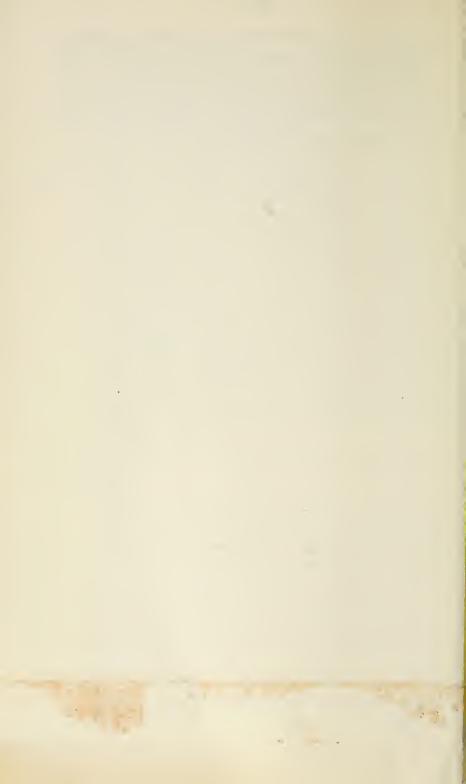
circumstances under 80 that respect Was the think she appreciate what testified in Н say to what she didn't fully her that tel1 influence she didn't cause were

the they Skene ass also discredit facts as by transactions that the this transaction. whole to establish the pattern and the other - by that testimony can't help but believe testimony, particularly when by testimony but borne out by and Holdorf in can not on transaction serves Н action seems to be disclosed, not Errion they unfold, and Н So, of Connell's

1mpeach-His in completely at variance with impeached. the, 40 testimony to the, and likewise as Certainly he was the of portion stand was Mr. Holdorf. large Coming the deposition. story on the ď certainly ment of

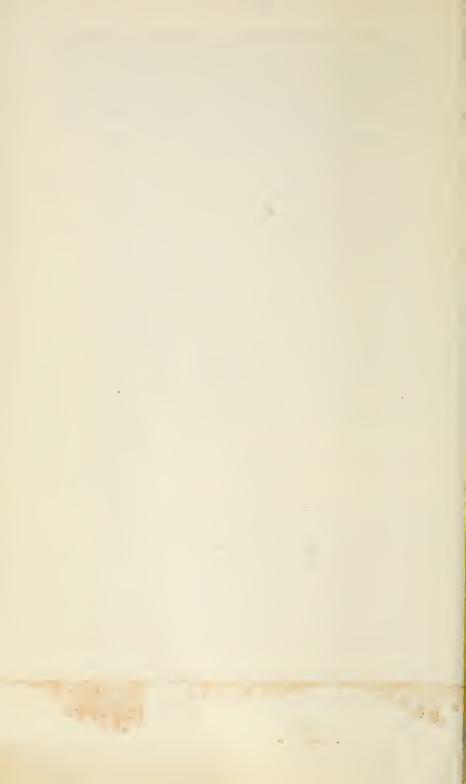
help testimony stand can't the clean breast from the he utter 1-1 how that on Court he was absent condition. the understand he testified here some of attempting to make a in view of an ulcer the Court review's can well from ulcers made. told the that when room because of Н statements the deposition Was suffering He believe when day he dictory and 06

other isn't impeached, testimony certainly Holdorf's 2 while Mr. it because So, relied pe



give stand. to the seem to cause the Court gave it on the testimony as he circumstances would to credit

However, the Court questionable pro thousand dollar property, whatever the value, property brief, possibly a morally wron; action in that it resulted, Possibly Mrs thousand unlawcertainly almost than whether than action peri that ot action involved was dismissed. worthless, oyster land, as the evidence shows. that it was the other transactions to establish the value therefore, there was no wrong committed other irregularity or and unlawful for, what it now develops, was worthless, or at î.s think, even if at least. amount of right of transaction wherein she was giving up, 113 thousand or 115 thousand or 120 she knew about that, however, and she was not engaging in a wrong, at least stated and argued in the defense 13 false values, or transactions perty under condemnation proceedings. was wrong in some degree. It completed, in some irregularity of the conduct her substantial Wrong of theory of not happen and I don't there was some Plaintiff ا ا it t giving a very course, and as Counsel part the the condemnation to assume on the deprive Of As establish fide to was Connell whether fulness 150 did to bona as



that in this case and that Court does not recognize an available defense in this case. that is

I believe I have covered all the

MR. WHITE: How about Holdorf Oyster

Corporation?

an instrumentality and liable and the Court will also THE COURT: The Holdorf Oyster Corporation, of course, I think being an involved corporation, is find them liable.

